S. HRG. 101–255

GENERAL AVIATION ACCIDENT LIABILITY STANDARDS ACT OF 1989

HEARING

BEFORE THE

SUBCOMMITTEE ON AVIATION

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 640

TO REGULATE INTERSTATE COMMERCE BY PROVIDING FOR UNIFORM STANDARDS OF LIABILITY FOR HARM ARISING OUT OF GENERAL AVIATION ACCIDENTS

JUNE 21, 1989

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CONTENTS

Page

Opening statement by Senator Ford 1
Opening statement by Senator McCain 2
Text of S. 640 4

LIST OF WITNESSES

Glickman, Hon. Dan, U.S. Representative from Kansas 21
Kassebaum, Hon. Nancy Landon, U.S. Senator from Kansas 23
Martin, Robert, on behalf of General Aviation Manufacturers Assn 27
  Prepared statement 30
  Questions of the Chairman and the answers 40
  Letter 126
Wagner, Bill, president, Association of Trial Lawyers of America 57
  Prepared statement 65
  Questions of the Chairman and the answers 76

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

Consumers Union, Consumer Federation of America, U.S. Public Interest Research Group, and Public Citizen, statement 109
Dole, Hon. Bob, U.S. Senator from Kansas, statement 95
Knapp, Rosalind A., Deputy General Counsel, DOT, letter 101
Mackey, John P., Deputy Assistant Attorney General, Department of Justice, letter 96
Mosbacher, Hon. Robert A., Secretary, Department of Commerce, letter 100
Power, William H., vice president, government affairs, National Air Transportation Assn., letter 103
Skinner, Hon. Samuel K., Secretarty, DOT, letter 99
Yodice, John S., general counsel, Aircraft Owners and Pilots Assn., statement 104

GENERAL AVIATION ACCIDENT LIABILITY STANDARDS ACT OF 1989

WEDNESDAY, JUNE 21, 1989

U.S. Senate,
Committee on Commerce, Science, and Transportation,
Subcommittee on Aviation,
Washington, DC.

The subcommittee met at 9:32 a.m. in room SR-301, Russell Senate Office Building, Hon. Wendell H. Ford [chairman of the subcommittee] presiding.

Staff members assigned to this hearing: Steve Palmer, senior professional staff member; Linda Lance, staff counsel; and John Timmons, minority staff counsel.

OPENING STATEMENT BY SENATOR FORD

Senator **Ford**. Good morning, ladies and gentlemen.

Today's hearing marks the third time since the 99th Congress that the Aviation Subcommittee has attempted to revitalize the health of the general aviation industry. To that point, this hearing is to consider S. 640, the General Aviation Accident Liability Standards Act of 1989, which I am pleased to join the former chairman of this subcommittee, Senator Kassebaum, in sponsoring.

Maybe the third time will be charm, Senator.

As Aviation Subcommittee chairman, I remain more convinced than ever that product liability legislation is needed to aid the general aviation manufacturing industry. Product liability costs continue to be the single biggest factor affecting the cost of new general aviation aircraft. And these cost increases have occurred despite the fact that the safety record for general aviation aircraft has improved consistently over the last decade.

It may help if I briefly illustrate how these costs have skyrocketed. In the past decade, the general aviation industry has endured an 875 percent increase in product liability litigation costs, from $24 million to $209 million, despite the ever-improving safety record.

The impact of these liability costs on the general aviation industry has been well documented. But the shear magnitude of those cost increases makes them worth repeating: sales of general aviation aircraft manufactured in this country have declined from almost 18,000 units in 1978 to only 1143 in 1988.

The domestic manufacturing base for general aviation aircraft has been devastated by these high liability costs. As a result, employment has plummeted, as entire aircraft model lines have been discontinued and factories closed. Foreign manufacturers have moved to fill the void left by our U.S. companies.

And as costs increase, the pool of prospective young people who can afford to take up flying continues to shrink.

Clearly, action must be taken to save our general aviation industry. Enacting legislation to establish Federal liability standards for the general aviation manufacturing industry is a significant step, in my opinion, that must be taken. And it is my sincere hope that this time we will be successful.

Senator McCAIN.

OPENING STATEMENT BY SENATOR McCAIN

Senator McCAIN. Thank you, Mr. Chairman. And Mr. Chairman, I would like to thank you for holding this hearing and your very vital support for this legislation. I would also like to express my appreciation to our colleague, Senator Kassebaum, and our friend and colleague from the other side, Congressman Glickman, who have both played an incredibly vital leadership role on this very important issue.

I think it might also be well to point out, though both individuals represent a state where general aviation is a very important part of their economy, I am convinced that their involvement and their dedication on this issue far transcends that aspect of their representation, and I am very appreciative.

Mr. Chairman, I will be brief. This is, as you mentioned, the third Congress in a row we have taken on this measure. While it might seem to be a narrowly focused piece of legislation, I think it is part of a much larger picture.

Aviation is clearly the most prominent mode of transportation today. It will have greater prominence in the nineties and beyond as we enter the international marketplace. A key ingredient to this is of course pilots. There is a demand on the part of the airlines for some 6,000 pilots this year. The military will produce 2500.

I remember with vivid clarity when Mr. Frank Borman testified before our subcommittee a couple of years ago and told us how, upon his return to general aviation, he has seen the virtual disappearance of the ability of young Americans to learn to fly airplanes, as opposed to his generation and indeed mine.

And he, correctly, laid this on the issue of aviation liability, product liability. It is just too expensive nowadays for young men and women to learn to fly airplanes.

Unless we regenerate general aviation, unless we give a rebirth to the ability of young men and women to fly airplanes, we are going to face a crisis in pilots as airlines continue to expand and the demand for pilots continues to expand.

I would just like to mention in passing, Mr. Chairman, as usual the Trial Lawyers of America show absolutely no desire whatsoever to compromise. They have shown no admission that there is even a problem, and frankly one of the most distasteful statements that I have read in my short seven years as a member of Congress is that of the Association of Trial Lawyers of America.

I think that the greed and selfishness they have displayed on this issue does them no credit, and I look forward to analyzing in detail this statement and to showing the American people how again we have seen absolutely no willingness to come to any kind of agreement or compromise on this issue.

They should be ashamed.

Thank you, Mr. Chairman.

Senator **Ford**. Thank you, Senator.

Without objection, Senator McCain, I am going to file for the record hearing transcript on S. 473 that we conducted in the 100th Congress on the general aviation accident liability standards. That was in December, 1987. I want to file that for the record, so that will be included in our deliberations during the 101st Congress.

I am very pleased this morning to begin with two fine witnesses: the former chairman and then the ranking member of our Aviation Subcommittee. Then she gave up on us and went on to other things. But we are delighted to have you here this morning, Mrs. Kassebaum.

Senator **Kassebaum**. Mr. Chairman, I would never give up on you. In fact, I am just delighted that you and Senator McCain are in charge, and I would like to yield my time first to comment to Congressman Dan Glickman, because he is in the middle of important business over in the House, a caucus meeting.

Senator **Ford**. Why is it their business is so important and we have to yield? I have never understood that.

Go ahead, Dan.

Senator **Kassebaum**. When the Democrats are trying to sort something out, that is important business, Mr. Chairman.

Senator **Ford**. Well, it is better than—well, I will not say any more.

[The bill follows:]

101st CONGRESS
1st Session

S. 640

To regulate interstate commerce by providing for uniform standards of liability for harm arising out of general aviation accidents.

IN THE SENATE OF THE UNITED STATES

March 16 (legislative day, January 3), 1989

Mrs. Kassebaum (for herself, Mr. Bond, Mr. Chafee, Mr. Danforth, Mr. Dole, Mr. Exon, Mr. Ford, Mr. Garn, Mr. Hatch, Mr. Heinz, Mr. Humphrey, Mr. Inouye, Mr. Kasten, Mr. Kerry, Mr. Lott, Mr. McCain, Mr. Pell, Mr. Pressler, Mr. Rudman, Mr. Symms, Mr. Wallop, and Mr. Wilson) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To regulate interstate commerce by providing for uniform standards of liability for harm arising out of general aviation accidents.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "General Aviation Accident Liability Standards Act of 1989".

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress finds that—

(1) transportation by air of passengers continues to comprise an increasingly important component of the Nation's overall transportation system;

(2) although the incidence of injuries to passengers in general aviation accidents has decreased, the number of general aviation accident liability claims against general aviation aircraft manufacturers and the amount of damages sought in such claims is increasing at disproportionate rates, beyond any relationship to the quality of the aircraft manufactured and in use;

(3) the current system for determining liability and damages for compensating individuals injured in general aviation accidents is inadequate;

(4) competent general aviation manufacturers and component part manufacturers are ceasing or limiting production of general aviation aircraft or some models of such aircraft because of the increasing costs and unavailability of product liability insurance;

(5) the increase in the number of liability claims and the size of awards and settlements, and the excessive time and expense devoted to the resolution of such claims, impose a substantial economic burden on general aviation manufacturers and their dealers;

(6) the Federal Government has an interest in the general aviation accident liability system because the

Federal Government has established a comprehensive system for regulating general aviation, including—

(A) establishing standards for design, construction, and certification of general aviation aircraft,

(B) establishing standards for maintenance of aircraft, licensing of repair facilities, and licensing of persons who may perform or approve maintenance, repairs, and inspections,

(C) establishing standards for training and licensing of pilots,

(D) establishing a comprehensive air control system,

(E) conducting investigations to determine the probable cause of aviation accidents and prevent future accidents, and

(F) conducting other activities necessary to assure a safe air transportation system;

and this Federal system is the exclusive legal authority for regulating aviation operations and safety;

(7) it is in the national interest to reduce unnecessary expenditures related to general aviation accident liability claims while providing more rapid and more efficient compensation for individuals harmed in general aviation accidents; and

(8) Federal action to reform the general aviation accident liability system will result in—

(A) the maintenance of airworthy general aviation aircraft; and

(B) a more rational general aviation accident liability system.

(b) It is the purpose of this Act to establish standards for determining liability for harm arising out of general aviation accidents.

DEFINITIONS

SEC. 3. As used in this Act, the term—

(1) "Administrator" means the Administrator of the Federal Aviation Administration;

(2) "claimant" means any person who brings a general aviation accident liability action subject to this Act, and any person on whose behalf such an action is brought, including—

(A) the claimant's decedent; and

(B) the claimant's parent or guardian, if the action is brought through or on behalf of a minor or incompetent;

(3) "general aviation accident" means any accident which arises out of the operation of any general aviation aircraft and which results in harm;

(4) "general aviation aircraft" means any aircraft for which a type certificate or an airworthiness certifi-

cate has been issued by the Administrator under the Federal Aviation Act of 1958 (49 App. U.S.C. 1301 et seq.) which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than twenty passengers, and which is not, at the time of the accident, engaged in scheduled passenger carrying operations as defined in regulations issued under the Federal Aviation Act of 1958 (49 U.S.C. 1301 et seq.);

(5) "general aviation manufacturer" means—

(A) the builder or manufacturer of the airframe of a general aviation aircraft;

(B) the manufacturer of the engine of a general aviation aircraft; and

(C) the manufacturer of any system, component, subassembly, or other part of a general aviation aircraft;

(6) "harm" means—

(A) property damage or bodily injury sustained by a person;

(B) death resulting from such bodily injury;

(C) pain and suffering which is caused by such bodily injury; and

(D) emotional harm (including bereavement and loss of affection, care, or society) which is caused by such bodily injury;

(7) "product" means a general aviation aircraft and any system, component, subassembly, or other part of a general aviation aircraft; and

(8) "property damage" means physical injury to tangible property, including loss of use of tangible property.

PREEMPTION: APPLICABILITY

SEC. 4. (a) This Act supersedes any State law regarding recovery, under any legal theory, for harm arising out of a general aviation accident, to the extent that this Act establishes a rule of law or procedure applicable to the claim.

(b) Nothing in this Act shall be construed to supersede or to waive or affect any defense of sovereign immunity asserted by the United States or any State.

(c) Nothing in this Act shall be construed to affect the liability of a manufacturer, owner, or operator of any aircraft that is not a general aviation aircraft, or a person who repairs, maintains, or provides any other support for any aircraft that is not a general aviation aircraft, for damages for harm arising out of the operation of an aircraft that is not a general aviation aircraft.

(d) No right of action for harm exists under this Act if that right would be inconsistent with the provisions of any applicable workers' compensation law.

(e) The provisions of this Act shall apply only to—

(1) any manufacturer, owner, or operator of any general aviation aircraft, and any person who repairs, maintains, or provides any other support for such an aircraft;

(2) any occupant of a general aviation aircraft at the time of a general aviation accident, and any person who brings an action for harm caused by such accident on behalf of such occupant; and

(3) any nonoccupant of a general aviation aircraft at the time of a general aviation accident, only if such nonoccupant is bringing an action for harm caused by such accident which arises out of the harm to an occupant of such aircraft at the time of such accident.

UNIFORM STANDARDS OF LIABILITY FOR GENERAL AVIATION ACCIDENTS

SEC. 5. (a) Any person claiming damages for harm arising out of a general aviation accident may bring an action against a party and may recover damages from such party, if such party was negligent and such negligence is a proximate cause of the claimant's harm.

(b)(1) Any person claiming damages for harm arising out of a general aviation accident may bring an action against a general aviation manufacturer of a product and may recover damages from such general aviation manufacturer if—

(A) the product, when it left the control of the manufacturer, was in a defective condition unreasonably dangerous for its intended purpose, according to engineering and manufacturing practices which were reasonably feasible;

(B) the defective condition is a proximate cause of the claimant's harm; and

(C) the general aviation aircraft was being used at the time of the accident for a purpose and in a manner for which it was designed and manufactured.

(2) Any person claiming damages for harm arising out of a general aviation accident may bring an action against a general aviation manufacturer of a product and may recover damages from such general aviation manufacturer if—

(A) at the time the product left the control of the manufacturer, the manufacturer—

(i) knew, or in the exercise of reasonable care should have known, about a danger connected with the product that caused the claimant's harm; and

(ii) failed to provide the warnings or instructions that a person exercising reasonable care would have provided with respect to the danger which caused the harm alleged by the claimant, unless such warnings or instructions, if provided, would not have materially affected the conduct of the user of the product; or

(B) after the product left the control of the general aviation manufacturer, the manufacturer—

(i) knew, or in the exercise of reasonable care should have known, about the danger which caused the claimant's harm; and

(ii) failed to take reasonable steps to provide warnings or instructions, after the manufacture of the product, which would have been provided by a person exercising reasonable care, unless such warnings or instructions, if provided, would not have materially affected the conduct of the product user;

and the failure to provide warnings or instructions described in subparagraph (A) or (B) of this paragraph is a proximate cause of the claimant's harm.

(3) Any person claiming damages for harm arising out of general aviation accident may bring an action against a general aviation manufacturer of a product and may recover damages from such general aviation manufacturer if—

(A) the manufacturer made an express warranty with respect to the product;

(B) such warranty relates to that aspect of the product which caused the harm;

(C) the product failed to conform to such warranty; and

(D) the failure of the product to conform to such warranty is a proximate cause of the claimant's harm.

(c)(1) In an action governed by subsection (b) of this section, a general aviation manufacturer shall not be liable if such manufacturer proves, by a preponderance of the evidence, that—

(A) the defective condition could have been corrected by compliance with action described in an airworthiness directive issued by the Administrator or a service bulletin issued by the manufacturer of the product; and

(B) such directive or service bulletin was issued at a reasonable time before the date of the accident and after the product left the control of the general aviation manufacturer.

(2) In any action governed by subsection (b) of this section, evidence of compliance with standards, conditions or specifications established, adopted or approved by the Federal Aviation Administration shall be admissible with regard to whether the product was defective and unreasonably dangerous for its intended purpose.

COMPARATIVE RESPONSIBILITY

SEC. 6. (a) All actions for harm arising out of a general aviation accident shall be governed by the principles of comparative responsibility. Comparative responsibility attributed to the claimant's conduct shall not bar recovery in an action under this Act, but shall reduce any damages awarded to the claimant in an amount proportionate to the responsibility of the claimant. The trier of fact shall determine comparative responsibility by making findings indicating the percentage of total responsibility for the claimant's harm attributable to the claimant, each defendant, each third-party defendant, and any other person not a party to the action.

(b) Except as provided in subsection (c) of this section, a defendant is severally but not jointly liable in any action for harm arising out of a general aviation accident, and the liability of any defendant in any such action shall be determined on the basis of such defendant's proportionate share of responsibility for the claimant's harm.

(c) In any action for harm arising out of a general aviation accident—

(1) a general aviation manufacturer who is the builder or manufacturer of the airframe of the general aviation aircraft involved is jointly and severally liable for harm caused by a defective system, component, subassembly, or other part of such aircraft that the manufacturer installed or certified as part of the original type design for such aircraft; and

(2) a general aviation manufacturer who is the manufacturer of a system or component of the general aviation aircraft involved is jointly and severally liable

for damages caused by a defective subassembly or other part of such system or component.

(d) A general aviation manufacturer and any other person jointly liable under subsection (c) of this section shall have the right to bring an action for indemnity or contribution against any person with whom they are jointly liable under subsection (c) of this section.

TIME LIMITATION ON LIABILITY

SEC. 7. (a) Except as provided in subsection (b) of this section, no civil action for harm arising out of a general aviation accident which is brought against a general aviation manufacturer may be brought for harm which is alleged to have been caused by an aircraft or a system, component, subassembly, or other part of an aircraft and which occurs more than—

(1) twenty years from—

(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

(B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such an aircraft; or

(2) with respect to any system, component, subassembly, or other part which replaced another product in, or which was added to, the aircraft, and which is

alleged to have caused the claimant's harm, twenty years from the date of the replacement or additon.

(b) Subsection (a) of this section does not apply in the case of harm to a claimant which occurs after the period set forth in subsection (a) of this section if the general aviation manufacturer or the seller of the product that caused the claimant's harm gave an express warranty that the product would be suitable, for the purpose for which it was intended, for a longer period of time.

(c) Nothing in this section shall be construed to affect a person's duty to provide, after the sale or lease of an aircraft, to aircraft owners, and to repair facilities to which a license or certificate to perform repairs has been issued by the Administrator, additional or modified warnings or instructions regarding the use or maintenance of such aircraft or any system, component, or other part of such aircraft.

SUBSEQUENT REMEDIAL MEASURES

SEC. 8. In any general aviation accident liability action governed by this Act, evidence of any measure taken after an event which, if taken previously, would have made the event less likely to occur is not admissible to provide liability. Such evidence is admissible to the extent permitted under rule 407 of the Federal Rules of Evidence.

ADMISSIBILITY OF CERTAIN EVIDENCE

SEC. 9. In an action governed by this Act, evidence of Federal, State, or local income tax liability or any Social

Security or other payroll tax liability attributable to past or future earnings, support, or profits and the present value of future earnings, support, or profits alleged to have been lost or diminished because of harm arising out of a general aviation accident is admissible regarding proof of the claimant's harm.

PUNITIVE DAMAGES

SEC. 10. (a) Punitive damages may be awarded in an action under this Act for harm arising out of a general aviation accident only if the claimant establishes by clear and convincing evidence that the harm suffered was the direct result of conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by use of the general aviation aircraft involved.

(b) Evidence regarding the financial worth of a defendant or the defendant's profits or any other evidence relating solely to a claim for punitive damages under this Act is not admissible unless the claimant establishes, before any such evidence is offered, that the claimant can present evidence that will establish prima facie proof of conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by use of the general aviation aircraft involved.

(c) In any civil action in which the alleged harm to the claimant is death and the applicable State law provides, or has been construed to provide, for damages only punitive in nature, a defendant may be liable for any such damages pursuant to the provisions of this Act regardless of whether a claim is asserted under this section. The recovery of any such damages shall not bar a claim under this section.

TIME LIMITATION ON BRINGING ACTIONS

SEC. 11. (a) Any action for harm arising out of a general aviation accident shall be barred, notwithstanding any State law, unless—

(1) the complaint is filed within two years after the date on which the accident occurred which caused the claimant's harm; and

(2) the summons and complaint are properly served upon the defendant within one hundred and twenty days after the filing of such complaint, unless the party on whose behalf such service is required can show good cause why such service was not made within such one-hundred-and-twenty-day period.

Paragraph (2) of this subsection shall not apply to service of process in a foreign country pursuant to rule 4(i) of the Federal Rules of Civil Procedure of any similar State law.

SANCTIONS

SEC. 12. It is the intent of Congress that, with respect to any action governed by this Act, the sanctions for violation of rule 11 of the Federal Rules of Civil Procedure, including orders to pay to the other party or parties the amount of their reasonable expenses, including a reasonable attorney's fee, be strictly enforced.

JURISDICTION

SEC. 13. (a) The district courts of the United States, concurrently with the State courts, shall have original jurisdiction, without regard to the amount in controversy, in all civil actions for harm arising out of a general aviation accident and in all actions for indemnity or contribution described in section 6(d) of this Act.

(b) A civil action which is brought in a State court may be removed to the district court of the United States for the district embracing the place where the action is pending, without the consent of any other party and without regard to the amount in controversy, by any defendant against whom a claim in such action is asserted for harm arising out of a general aviation accident.

(c) In any case commenced in or removed to a district court of the United States under subsection (a) or (b) of this section, the court shall have jurisdiction to determine all claims under State law that arise out of the same general aviation accident, if a substantial question of fact is common to the claims under State law and to the Federal claim, defense, or counterclaim.

(d)(1) A civil action in which the district courts of the United States have jurisdiction under subsection (a) of this section may be brought only in a district in which—

(A) the accident giving rise to the claim occurred; or

(B) any plaintiff or defendant resides.

(2) In an action pending in a district court of the United States under paragraph (1) of this subsection, a district court may, on motion of any party or its own motion, transfer the action to any other district for the convenience of parties and witnesses in the interest of justice.

(3) For purposes of this subsection, a corporation shall be considered to be a resident of any State in which it is incorporated or licensed to do business or is doing business.

SEVERABILITY

SEC. 14. If any provision of this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and the application of the provision to any other person or circumstance shall not be affected by such invalidation.

EFFECTIVE DATE

SEC. 15. (a) This Act shall apply to any civil action for harm arising out of a general aviation accident which is filed on or after the date of enactment of this Act.

(b) If an action governed by this Act is filed within one hundred and eighty days after the date of enactment of this Act, liberal leave shall be given to a party to amend any pleading, motion, statement of jurisdiction or venue, or other matter to conform to the provisions of this Act.

○

STATEMENT OF HON. DAN GLICKMAN, U.S. REPRESENTATIVE FROM KANSAS

Mr. GLICKMAN. Thank you very much, Senator Ford and Senator McCain.

We are having the wind-down of the elections of House leadership this morning, so hopefully that will be behind us and we can move forward to substantive issues.

I first of all thank Senator Kassebaum for yielding, and her statement reflects my views entirely.

I was just telling Senator Kassebaum, when you mentioned to Senator Ford we have gone through this before I remembered that song that starts out "It seems we have stood and talked like this before." And this is the third or fourth time we have done this.

I would just make a couple of comments. Number one, this is reasonable, balanced legislation. I know you are going to hear from Bob Martin, a distinguished aviation attorney in Wichita, who will go into much greater detail. But this legislation is not meant to be punitive, it is not meant to be anti-plaintiff.

It is meant to be fair and balanced. It does not have caps on damages, it does not limit contingency fees. It tries to deal reasonably with areas of the law that have gone awry, particularly as it affects this industry.

From that standpoint I think that we are dealing with balanced legislation. Without legislation, it will be virtually impossible for manufacturers to build smaller single-engine airplanes, that is the less expensive aircraft. I think they will always be able probably to build the higher end corporate jets that can be purchased either by the more affluent or by the corporate world.

Senator McCAIN. Like trial lawyers.

Mr. GLICKMAN. But they will not be able to be purchased by the new entrants into the market, people who want to come into flying. And that is going to have a tremendous effect on American aviation.

One is, if the airplanes are built at all, they will be built overseas. Number two, it is not encouraging a new generation of pilots, as Senator McCain says, so that the infrastructure of flying is hurt, flying not only for general aviation but for commercial aviation and military aviation. And I think that is very significant.

For those of us who live in rural and underserved areas, this is a profound influence, because it is often the only way we can generate both personal travel as well as commercial travel, is through small airplanes. And if you live in communities that are 200 or 300 miles away from a major hub city or a major place where there is air traffic, smaller airplanes are the only way to get there.

This works to a tremendous disadvantage to people who live in underserved areas. I think that this legislation is fair and balanced and restores jobs in Kansas and other places where we build airplanes. If it is not passed, it will have profound effects on aviation in the next 50 years in this country. Over the years, a private pilot who started in a Cessna 172 or a Piper Cub has usually been the person who has moved up through the infrastructure to become the commercial airplane pilot, or the general aviation pilot that flies for commuter carriers, or, in many cases a military pilot as well.

So that infrastructure will be hurt.

Finally—and I am not here to polarize the Trial Lawyers. I myself was a trial lawyer. I have many good friends in the group. Some of my best friends are trial lawyers.

I would say, however, I think their concern about this bill is as much that this is the camel's nose under the tent. I get the feeling that, in and of itself, they do not think this is the worst bill in the world.

They have focused on it, but I think it is their general concern about across-the-board product liability. And I guess my point is, to state again for the record, that aviation is a 100 percent Federally regulated industry. There is virtually no state involvement in aviation.

From the certification of an airplane, to the pilot's licenses that are granted to flying in the industry itself, they are 100 percent Federal. There is no state involvement at all.

It just seems to me that it makes logical sense, regardless of what happens with other product liability bills, that this one should have some standardization.

I stand ready to work with them, as I know you do, Senator McCain, to try to come up with some responsible compromise. I frankly think our bill is responsible, but I also stand ready to work with them on the House side.

It does appear to me that we will get action in the Public Works Committee. We have a new chairman of the House Judiciary Committee. I am hopeful that we will be more successful than we have been in the past.

But quite frankly, I naturally hope that on this side of the aisle the movement continues as well, because the bicameral movement will keep this process going. I know that you all care very much about the future of aviation generally. I think that this bill goes a long way toward furthering that objective in a uniquely American industry, airplane manufacturing.

So I would just hope that we can get it out, and Senator Kassebaum's bill is the right bill to move.

I appreciate very much your allowing me to testify today. Thank you.

Mr. Chairman, members of the subcommittee, I want to thank you for inviting me to testify here today. The issue of general aviation liability is paramount to the district I represent, Wichita, Kansas. Not very many people know that half the planes in the world are made in Wichita by Beech, Cessna, Learjet, and Boeing. Boeing is doing record-breaking business, but the general aviation industry is on its knees. This is bad for Wichita and for the country because the United States traditionally has been the leader in this high-tech industry. Burdensome liability costs are dragging this industry down.

Liability costs for American general aviation manufacturers have skyrocketed—from $24 million in 1977 to $210 million in 1985, despite a steady improvement in safety. The general aviation industry has suffered badly as a result, and the situation does not appear to be improving. The industry sold 1,143 planes in 1988, compared with almost 18,000 a decade ago. Employment has fallen by 65% since 1980. The irony of all this is that 1988 was the safest year ever in terms of accidents. If there is ever going to be any kind of real recovery, the laws that affect these liability costs will have to be changed.

Foreign manufacturers are moving to fill in the void. Unless we act soon, we may see the names of Beech, Cessna, Learjet, and Piper replaced by Socata, Grob, Porsche, Rushmeyer, Sammi and Agusta. The FSX deal has brought needed attention to the potential loss of U.S. preeminence in a vital industry. We need to look out for our own, or we will find that general aviation has gone the way of the color television, VCR, and computer chip.

The General Aviation Standards Act of 1989 is a reasonable bill. It sets uniform federal standards of liability that make sense. Two fundamental points it addresses are that a manufacturer should not be liable forever for the performance of a product, and that liability should be tied to blame. The deep pocket in this industry has run out of resources and cannot continue to be called upon to pay for the fault of others.

Further, in an industry pervasively regulated by the federal government, from pilot licensing to manufacturing specifications and air traffic control, federal laws should decide questions of liability as well.

I thank the Chairman for this time, and I urge you to mark up this bill as soon as your busy schedule allows.

Senator FORD. The bill that you introduced in the House is identical to Senator Kassebaum's?

Mr. GLICKMAN. It is virtually identical. There are some minor changes, because it reflects a markup vehicle that came out of the House Public Works Committee last year. So there are some slight changes, but nothing material.

Senator FORD. Okay, fine. I wanted to be sure that we were working on dual tracks.

Mr. GLICKMAN. Yes.

Thank you very much, and I appreciate the fact that Senator Kassebaum let me have this opportunity. But her bill is essentially the bill that we all support.

Senator FORD. I wanted to be sure that we were both on the same wavelength and moving in the same direction.

Senator Kassebaum.

STATEMENT OF HON. NANCY LANDON KASSEBAUM, U.S. SENATOR FROM KANSAS

Senator KASSEBAUM. Thank you, Mr. Chairman and Senator McCain.

As I said before, I am so pleased that this legislation, which both Congressman Glickman and myself and both of you care so much about, is in such capable hands.

It is a pleasure to be back on the other side of the stand, so to speak, and offering some testimony. And I think that Congressman Glickman really summed it up very well, particularly his analysis perhaps of why the Trial Lawyers Association has fought this particular bill, because we have tried very hard to answer some of the concerns they have. There has been a lot of time spent in trying to find some compromises.

I really cannot think of a better effort that has been made to find a fair and balanced bill.

The committee chairman, Senator Hollings, has wanted to have another hearing on this for new members so there was a record one more time of some of the concerns and the pros and cons of the legislation, and I certainly understand that, and appreciate you, Mr. Chairman, holding this hearing in a timely fashion.

I think it bears repeating, maybe as you said the third time is a charm and I certainly hope so, but some facts I would just like to go over briefly one more time.

Close examination of the problems plaguing the general aviation industry is critical if we are going to help the industry survive. And it really is not just Wichita. It is the new pilots that Senator McCain spoke of. It is the whole atmosphere of general aviation and aviation and technology that comes from that involvement of the small planes, the pilots who learn, and the health of the general aviation industry.

In the past ten years we have witnessed a 93 percent decline in general aviation airplane sales, with only 1,143 planes sold in 1988, down from 17,000 sold in 1979. In the process, of course, we have lost thousands of high technology manufacturing jobs.

During the same period, liability costs have soared from $24 million to over $210 million annually for the industry. This is not due to an increase in accidents. As a matter of fact, as we all know, the accident rate has improved steadily.

It is due solely to the size of damage awards and the expanding number of situations in which manufacturers are held responsible for damages from general aviation accidents. In short, general aviation accident rates are going down while liability costs are soaring.

We need to ask serious questions about the standards to which aircraft manufacturers are held in our current tort system, and we also need to find, I think, constructive, effective answers, such as S. 640.

I think the problem, Mr. Chairman—and I think that you would both agree with me—is that there is no uniform standard which applies to liability cases for this industry. The result is inconsistent court judgments from state to state, and in turn instability and unpredictability in the industry.

I really think that, as Congressman Glickman pointed out, for an industry which has to meet such high standards of Federal regulations from beginning to end not to acknowledge this one simple solution I think just is hard to understand, all aspects of aviation being regulated except product liability.

The issue of aging commercial aircraft is one, Mr. Chairman, that your committee has looked to. I think it is a very important issue. It is one that is growing in concern. But I think it is important to point out that, just as proper, effective inspection and maintenance is so critical for ensuring a long and safe life of an airplane, so too is the responsibility for this inspection and maintenance critical to the argument behind S. 640.

When a manufacturer sells an aircraft, the new owner is responsible for the inspection, maintenance, and upkeep of that aircraft. As long as the manufacturer provides the required warnings and information, he should not be held liable for an accident that results from the owner's failure to perform these responsibilities.

This, Mr. Chairman, is not the manufacturer's responsibility. To address this, S. 640 establishes a 20-year statute of repose for aircraft replacement parts which begins anew each time a system or part is replaced. In this way, we are not allowing anyone who is at fault to get off the hook, but we are ensuring that manufacturers are held responsible only for those wrongs they have committed and no more.

It is worth noting that the European Community is far ahead of the United States in reforming its product liability standards, including the institution of a ten-year statute of repose. This is half the 20-year statute we propose in S. 640.

The bill also retains, as I pointed out and we all know, both strict liability and joint and several liability between the manufacturers in all subsystems and component parts, and it enacts comparative responsibility among other parties.

I believe it is important to point out to the committee what the bill does not do. It does not cap damages in any way. It does not cap or limit attorneys' fees. It does not waive the responsibility to supply warnings against dangers, regardless of the age of the product. It does not limit warranties given by the manufacturer, nor does it limit a person's right to sue.

As the sponsor of the General Aviation Accident Liability Standards Act of 1989, I am pleased to be joined by a bipartisan group of 23 Senators in support of this measure. These cosponsors include many of the members of this subcommittee and others on the full Commerce Committee, including Senators Ford, McCain, Kasten, Exon, Inouye, Danforth, Pressler, Kerry, Lott and Burns.

This bill also has the support of both manufacturers and users of general aviation, a combination that is unique for a product liability reform bill.

In addition, the new Administration has sent letters to Congress in support of this legislation. I have with me copies of letters from the Departments of Transportation, Justice, and Commerce, and I ask that these be placed in the record at the end of my statement.

As you know, Mr. Chairman, the issue of aviation liability reform is not a new one to this subcommittee or to the rest of the Congress. In two previous Congresses, the Commerce Committee held hearings on this legislation and reported measures identical to S. 640 out of committee. The testimony taken at those hearings documented a liability crisis of major, if not catastrophic, proportions.

Mr. Chairman, when the European Community consolidates its markets in 1992, our domestic industries will face new challenges in the trade arena. With 1992 just around the corner, we cannot afford to overlook the realities of the problems for our general aviation industry if the Congress does not act expeditiously on S. 640. With sales down among major manufacturers, our foreign trading partners are readying their planes for export to our country.

Wichita, Kansas is currently known as the "Air Capital of the World," largely because of the prowess of the three major general aviation manufacturers based there. A change in this status would hurt not only the industry in Kansas, but would also further weaken our domestic industry.

General aviation is a major part of our national air transportation system, and is today facing a crisis of unprecedented proportions which is related to the tort system. While rising product liability costs are not the only factor contributing to the decline of the industry, they are certainly among the most significant.

And I ask also that a very strong letter of support by Secretary of Transportation Skinner be made a part of the record.

Senator **FORD**. That is so ordered.

Senator **KASSEBAUM**. As well as a strong statement of support from the Republican leader in the Senate, Senator Bob Dole.

Senator **FORD**. They shall be included in the record.

Senator **KASSEBAUM**. Again, thank you, Mr. Chairman, very much for holding this hearing, for your support, Senator McCain's support. I look forward to working with you in any way that I can to be helpful.

Senator **FORD**. Thank you, Senator. I have no questions for you.

Senator McCain, do you have any questions for Senator Kassebaum?

Senator **MCCAIN**. Mr. Chairman, I again would like to thank Senator Kassebaum for her leadership on this issue.

Am I correct to say that the Administration is in support of this legislation?

Senator **KASSEBAUM**. Yes, very strongly.

Senator **MCCAIN**. So the Secretary of Transportation finds no problems with this legislation, indeed thinks it is important. I think it is interesting to note that, since he was the head of the Chicago Regional Transportation Authority and has a very extensive background in general aviation. I believe he is a pilot himself.

Senator **KASSEBAUM**. That is true, and has said he would do whatever he could to assist with passage of this legislation.

Senator **MCCAIN**. I also note that the Secretary of Transportation has ordered measures to be taken as far as non-commercial general aviation aircraft, so that we can make sure that the same standards that are being applied to commercial aircraft are applied to general aviation as well.

I think that perhaps one of the most important parts of your statement and perhaps the most compelling argument, Senator Kassebaum, is what this legislation does not do, since the opponents of this legislation are conveying the impression that it does a lot of things which it simply does not do.

Senator **KASSEBAUM**. That is very true.

Also, if I could just follow on, something else that I think is important to remember is that as we look to Europe 1992 and the plan of the European Community in their trade and tariff barriers, they are going to be much more aggressive in their competition as trading partners with the rest of the world.

I personally think it is an exciting challenge, but obviously I think we need to remember it is going to be a challenge. And the fact that they are already addressing their liability concerns in a way that is going to be beneficial to their manufacturers I think behooves us to look to the sensible avenues that we have before us, which we simply have not been able even to get to a vote on the floor.

To not be able to take this to a vote I think is really blocking an issue that should be of broader concern than just general aviation even at this point.

Senator McCain. Thank you very much.

Thank you, Mr. Chairman.

Senator Ford. Thank you, Senator McCain.

Thank you, Nancy.

The next witness will be Mr. Robert Martin, senior partner of Martin, Pringle, Oliver, Triplett & Wallace of Wichita, Kansas. Mr. Martin, it is good to see you again. Welcome to our hearing.

STATEMENT OF ROBERT MARTIN, ON BEHALF OF GENERAL AVIATION MANUFACTURERS ASSOCIATION

Mr. Martin. Thank you, Mr. Chairman.

This is my third appearance before this committee and I welcome the opportunity to speak to you, Mr. Chairman and Senator McCain.

I almost do not know where to start here. I guess one of the things I would like to say is that I have a huge personal stake in what we have before us. I have been a pilot for close to 50 years. I was a World War Two combat pilot with the Eighth Air Force.

I have been a practicing lawyer devoted almost entirely to the trial of lawsuits for almost 41 years, and I have been actively involved in aviation product liability for 20 years. I have had experience with hundreds of product liability cases in the aviation field.

The situation here is that—and I will not repeat some of the things that have been said by the two distinguished witnesses that preceded me. But what I really wanted to point out is that, despite the economic recovery in this country, this industry has not recovered.

Last year we sold about four percent more airplanes in units than we did the year before. This U.S. segment of the industry is virtually out of the small airplane business. We have a lot of competition now from abroad. The French are here with Aerospatiale. They are opening up an assembly plant. The plane will be made in Europe, of course. The French have purchased Mooney, a former U.S. manufacturer. It is gone; it is now in foreign hands.

The West Germans are here, the Koreans are here, the Brazilians are here, and we are going to have more entrants and we are going to be out of the small airplane business, with exactly the consequences that Senator McCain has mentioned and others.

We have lost a large share of our technology. Until we can get some remedy here we are, with a fleet of 200,000 small airplanes out there that has to be supported every year by a new product liability cost, we can never equal the cost base that the foreign manufacturers are going to have.

A very interesting development is, I have maintained for years that when the foreign countries develop a sizable fleet of airplanes in the United States they are not going to assume these costs. And it is interesting for me to note as a lawyer that the European Community has now said they are going to go to a ten-year statute of repose.

We have asked here for a 20-year statute of repose. They are not going to pay these bills.

I think the plaintiffs' lawyers are making a mistake in opposing this bill. They are going to have an awful time collecting some of these huge judgments, some of them very unfair judgments, from foreign manufacturers.

Now, there is one other thing that I would like to talk about here. There has been a lot of misrepresentation as to what this bill really says. For example, I have read the statement over and over again originating with the Trial Lawyers that this bill engrafts negligence standards onto the strict liability standard.

That is not true. That is absolutely untrue. And all you have to do is read the bill. If you read, if you make even a cursory reading of section 5 of this bill, what it says is it enacts strict liability. It says that whether or not that product is safe it will be judged by economic—I mean by engineering and manufacturing standards that were reasonably feasible at the time the airplane was built.

How can you hold a manufacturer to a greater standard than that?

There is a suggestion made that this bill gives the manufacturer an absolute defense in terms of compliance with government standards. That is not true either. What this bill says is that evidence that the manufacturer has complied with FAA regulations in the design or building of the airplane is admissible into evidence.

It does not say that it is going to prove anything in terms of the outcome of the case. It just says it is admissible, which in some states it is not. And what it also says is that the manufacturer has the burden of proof to show that he has made that compliance, which by the way is not the law in every state. It is in some states.

This is not an unbalanced bill and it is not going to cut off everybody's rights. And I thought I read this into or heard this implied in what Senator McCain said, but I am disgusted by some of these misrepresentations about what this bill says.

I am equally outraged at some of the examples that are given as to unsafe products. I could take the rest of the morning explaining to you the history of the Bonanza airplane, and what is said about the outcome of one case is not the truth.

But let me say that the facts are that the Bonanza, with its almost 50 years of history now, is the safest single-engine retractable high performance airplane ever built. It has the best overall safety record of any such airplane.

We have made a change in some models and we did that as a result of about $2 million that we spent to finance an FAA investigation, which started long before the one case that Beech lost, and as a matter of fact produced that loss because we had to reveal the results of that study, and we should have.

I think the point that really needs to be made here is, what we cannot live with and should in a way never have been required to live with is the conflict that exists between the dominance of Federal regulation of how we design our airplanes, how we build our airplanes, how they are flown and how they are managed in traffic, and how they are maintained, by the FAA and the Federal system and 50 different rules that show up in 50 different states.

That is the crushing burden. It is the burden which has imposed in round numbers someplace between $50 and $100 million worth of costs on this small industry year-in, year-out.

It is the burden that has reduced employment in just the airframe manufacturers' plants by some 23 to 25,000 jobs over the last ten years. In Kansas alone it approaches 20,000 jobs.

We cannot afford that. That is the price we pay for the Trial Lawyers to have a wide-open opportunity to forum shop where they can bring their cases in an environment which will prove to be most beneficial to their claims, and their claims in court are just as outrageous in some cases as they have been in statements before this committee and others.

All we want and what we are trying to get here is reasonably stable legal consideration of when we are wrong and when we are not wrong. And the other thing we are trying to get here is to lay the responsibility where the responsibility belongs.

As Senator Kassebaum pointed out, it is the owner who is obligated to perform the inspections and the required maintenance to keep his airplanes in safe operation. The manufacturer has no way to do that. We can help them. We can issue safety instructions, we can go to the FAA and say, here is a problem that has shown up, issue an AD to correct it.

We can do those things, but we have no way to force them to do it. And until they become legally responsible, instead of the manufacturer being legally responsible for their mistakes, which he is in many state court jurisdictions, that part of the aviation industry is not going to respond to their responsibility and the airplanes are not going to get any safer than they now are.

One other thing I would like to point out, and that is that we tend to underestimate the effect on the national transportation system of general aviation. I do not have exact figures, but in round numbers we transport almost as many people every year—it is the same people over and over again in large measure, but we transport as many people as the domestic airlines do.

There are large areas of this country that are served almost exclusively by our airplanes, and that is not going to change with the capital cost of building highways and railroads.

We must have this transportation system, and the real question that lies before the two houses of Congress is, are we going to do that with foreign-made airplanes or are we going to do that with U.S.-made airplanes? Are we going to have an adequate pool of pilots to move the U.S. population the way it wants to be moved or are we not going to have that?

That is really what the issue is. I think I have concluded my remarks and I would be happy to answer any questions.

[The statement and questions and answers follow:]

STATEMENT OF ROBERT MARTIN, ON BEHALF OF GENERAL AVIATION MANUFACTURERS ASSN.

Good morning, Mr. Chairman and members of the Subcommittee. I am Robert Martin, counsel to the Beech Aircraft Corporation. I am pleased to be able to testify on behalf of the General Aviation Manufacturers Association which represents airframe, engine, avionics and other component manufacturers. Collectively, our membership accounts for 95 percent of the general aviation manufacturing activity within the United States.

After examining the devastating impact that product liability is having on the general aviation industry, the Committee on Commerce, Science and Transportation last year reported S. 473, the General Aviation Standards Act of 1987 -- the same bill that had been reported in the 99th Congress. We deeply appreciate this action and hope the Committee will favorably report S. 640 which is identical to last year's bill. This legislation is urgently needed for several reasons:

1. The vitality of U.S. general aviation manufacturers has been severely impaired. Unit deliveries have plummeted from over 17,000 in 1979 to 1,143 last year. The U.S. competitive position in the world marketplace is being threatened as foreign manufacturers take action to fill this void.

2. Product liability costs remain the single largest cost element facing the producers of piston engine aircraft. The Cessna Aircraft Company, for example, for many years the world's leading producer of piston-powered airplanes, stopped producing them in 1986. Cessna's chairman recently stated that, if this legislation should pass, within 24 hours Cessna would announce the resumption of single-engine production.

3. Product liability situation in general aviation is not improving. Manufacturers are still responsible for the aging fleet even though planes may not have been properly maintained by owners and operators. Product liability costs have not abated. Judgments, verdicts, high defense and settlement costs all contribute to the current situation.

4. General aviation liability issue is not an insurance issue. Some general aviation companies are completely self-insured. Others are self-insured up to levels of $100 million. The current tort system is driving up costs, not rates or availability of insurance. In fact, some insurance rates are coming down due to increased capacity in the industry, but product liability costs are still the major problem.

5. S. 640 has the support of every major general aviation consumer group and publication. These groups are concerned about the future of the industry. General aviation consumers want new products at reasonable costs.

6. This legislation has wide-based support in the Congress. In addition to considerable bipartisan support in the Senate, the House Public Works Committee favorably reported similar legislation in the 100th Congress.

It is highly appropriate that the Subcommittee on Aviation take the lead in pushing general aviation liability reform legislation, just as it has in the past two Congresses. As you know, the Federal government, through the FAA, regulates virtually every aspect of the general aviation industry. From design through production, operation, maintenance and even accident investigation, Federal rules apply. Significantly, questions regarding these rules and regulations are often key elements in general aviation tort liability cases. A federal tort statute is a logical and necessary complement to such extensive regulation.

We have had an opportunity to testify on this issue before several Congressional Committees during the past few years. Our story has become quite well-known and the identical bill which this Committee reported last year earned the co-sponsorship of 26 of your Senate colleagues, the same number already co-sponsoring this bill.

This apparently has triggered considerable concern within the Association of Trial Lawyers of America. Earlier this year they distributed on the Hill a 4-page brochure whose cover page boldly pronounces the following: "WARNING: The General Aviation Liability Bill is UNFAIR to Consumers and Victims." The brochure offends those who know and understand the general aviation liability problem, and particularly those who are suffering from it. It also does a great disservice to those who do not fully understand the issue by distorting the facts. The ATLA brochure is a malicious attempt to undermine the legitimate efforts of an industry struggling for survival in the face of a tort system being exploited by a litigious society.

The brochure contains numerous allegations which are simply not true, and isolated or irresponsible quotations are cited out of context. Clearly the brochure is a self-serving compendium of distortions. It is an attempt -- without merit -- to discredit a bill that has been carefully drafted, is well-justified and is universally supported by the aviation consumers. Mr. Chairman, we prepared a point-by-point rebuttal to the ATLA brochure which we would like to submit for the record.

It is important, I believe, to review the recent history of general aviation in this country. What was once a booming domestic manufacturing industry, accounting for over 17,000 unit deliveries in both 1978 and 1979, is now an industry that has suffered annual decreases in shipments. Last year we delivered 1,143 airplanes -- up from 1,085 in 1987 -- the first annual increase in a decade, but still over 90 percent below our good years.

A number of economic factors likely contributed to this decline in the early 1980's, but many factors, such as high interest rates and an economic recession, have disappeared. The one factor that persists is our industry's high product liability costs. In the past decade, the paid claims for judgments, settlements and defense jumped from $24 million to $210 million. At Beech, product liability cases over a 4-year period cost the company on average $530,000 -- win, loose, or draw. These costs have grown despite the fact that the general aviation accident rate has shown steady improvement since 1946. In fact, according to National Transportation Safety Board data, 1988 was the best year in general aviation history.

This improving record is the result of a conscious and determined effort by the aviation community. The airplanes we build today are safer and better aircraft than the ones we built before. Manufacturers know that airplanes must have good safety records in order to sell. FAA standards continue to become more stringent as the availability and affordability of technological advancements are improved. Government, industry and user group efforts, directed at accident prevention, have shown that pilot education can reduce accidents, and aggressive steps to improve education are under way. All these factors, which collectively have reduced the accident rate, have not reduced the manufacturer's product liability burden.

Historically, general aviation has played an important role in the international trade arena. Prior to 1981, the U.S. general aviation industry enjoyed a positive trade balance which contributed to our nation's trade surplus. Since 1981, the general aviation industry has had a negative trade balance, due in part to our growing product liability problem which is eroding our competitive position in several ways.

U.S. manufacturers are liable for their products under the U.S. tort system regardless of where harm might be incurred. In fact, suits are brought in to the United States to take advantage of our tort law -- even when accidents have occurred in foreign countries. Foreign manufacturers are liable under U.S. laws only for their products which are operated in the United States. In most cases, this is a small percentage of their total in-service fleets which entail significant risk differentials from the American manufacturers. This disparity provides a competitive foreign cost advantage.

It is interesting, Mr. Chairman, to note that the European Community is ahead of the United States in establishing uniform product liability laws. The E.C. Council issued a directive (85/34/EEC) in July 1985 with a 3-year implementation period. It includes a 10-year statute of repose which is just half the 20-year provision in S. 640.

Another competitive factor is the number of aircraft for which a given manufacturer is responsible. As of December 31, 1987, there were over 194,000 active piston engine-powered aircraft in the U.S. About 98 percent of these are U.S.-built. This is an enormous and aging fleet for which our manufacturers remain liable in most states. Half of these airplanes are over 22 years old; one quarter are over 32. Our liability costs due to this huge liability "tail" far exceed those of our foreign competitors who have comparatively few aircraft in service, which gives them another competitive advantage.

Our manufacturers recognize their responsibility not only to build quality products but to stand behind those products as well. The rights of the consumer are a very legitimate concern, and S. 640 was drafted with consumer interests in mind. The bill contains no caps on damages nor does it impose any constraints on the contingency fee system. What it does do, however, is place responsibility where it belongs -- with the culpable parties, and not necessarily on the shoulders of the manufacturer with the "deep pocket."

The aviation consumers who would be directly affected by this bill support it. Virtually every general aviation consumer group and trade publication supports and encourages passage of S. 640. They recognize that changes to the system must be made if new airplanes are to be produced and parts are to be available at affordable prices. The Aircraft Owners and Pilots Association, the Experimental Aircraft Association, National Business Aircraft Association, Helicopter Association International, National Air Transportation Association, National Aeronautical Association and National Agricultural Aviation Association are among those groups.

HOW WOULD S. 640 HELP?

1. S. 640 would establish a uniform federal law and eliminate the forum shopping or the often difficult conflict of law choices that must be made today because the financial results of a case often depend on the state laws that are applied. Every aspect of general aviation activity, except tort litigation, is federally regulated. This bill would eliminate uncertainties, such as the following:

> "....The choice then, appears to be between Texas law and Georgia law. The choice is an important one given the differences between Texas and Georgia law. For example, Georgia still follows the pecuniary loss rule in wrongful death cases, but apparently does not allow reductions for personal consumption expenses of the decedent. GA Code Ann. Sec. 105-1301(1). Texas law is opposite on both counts."

> Ruth Henderson Moorhead, et al. v. Mitsubishi Aircraft International, Inc., et al. Lynda M. Hutchinson, et al. v. United States of America, et al. Rose Marie Baker McNeill, et al. v. Mitsubishi Aircraft International, Inc., et al. United States District Court, E.C. Texas, Marshall Division, Nos. M-81-12[illegible]CA, M-83-65-CA and M-83-140-CA, June 19, 1986, 639 F. Supp. 385. Section II. Liability;

A. Conclusions of Law, paragraph 5.d., last sentence including the note.

2. S. 640 would recognize the pilot's obligations and the need for careful maintenance and operation, particularly for older aircraft. When coupled with FAA's rules requiring correction of defects and notifications to pilots, this would allow, without disadvantage to the public, an end to the manufacturer's liability for claimed defects after a reasonable period of time. Aircraft last an extraordinarily long time as evidenced by the fact that over one quarter of the general aviation fleet was built before 1957. S. 640 would establish a fair and realistic time for the manufacturer to be responsible in tort actions for his product. The manufacturer would, of course, continue to be responsible, under FAA regulations, for defect corrections and notifications to operators. The bill would not permit unreasonable cases such as the following:

> On May 5, 1979, Paul Walter purchased a 1954 Cessna 195B airplane in Tampa, Florida. Before leaving, Walter left the airplane outside during several days of torrential rain. After take off, it crashed in Tampa because Walter had neglected to drain the water from the fuel tanks using "quick drains" which were installed long after the aircraft was built. Fortunately, there were no fatalities or serious injuries. However, the manufacturer was sued because the owner's manual -- on an airplane model which had been discontinued for nearly three decades, and was not originally equipped with these

drains -- did not include instructions on their use. The manufacturer lost the million dollar suit.

Paul Walter and Jean Walter v. Cessna Aircraft Company. Wisconsin Court of Appeals, District II, No. 83-2069, October 24, 1984.

3. S. 640 would establish true comparative fault. Aircraft manufacturers would continue to be responsible for their products, but they would not be responsible for actions beyond their control. Today, manufacturers are often forced to pay damages that exceed their degree of fault in an accident.

In a previous cause of action for personal injuries arising out of a plane crash, a joint and several judgment was rendered against defendant Piper Aircraft Corporation, defendant Logan, and defendants Berz. "We are asked to determine whether, in this action for contribution, plaintiff Piper Aircraft Corporation may recover of defendants Logan and Berz such amounts as it has paid to the injured persons, over and above its pro rata share...."

Piper Aircraft Corporation v. Gerald M. Dumon, Administrator of the Estate of David W. Logan, deceased and Milton H. Berz, Jr., and Mary Jane Berz, Individually and d/b/a Berz Flying Service, Jointly and Severally. Michigan Supreme Court, No. 70006, Filed December 28, 1984, Released February 1, 1985.

CONCLUSION

In conclusion, Mr. Chairman, the general aviation industry is unique in the degree -- virtually 100 percent -- to which it is federally regulated. Only in tort litigation is it subject to the widely differing vagaries and varieties of state laws. A federal statute would inject some sense of stability, predictability and uniformity into this current amorphous system.

Our manufacturers have repeatedly said that they will continue to accept responsibility for their products; and S. 640 (and FAA's regulations) would ensure that they do. It is fair to all concerned, and that is why it is supported by both the manufacturers and the users and, significantly, by the Administration. It imposes neither caps on damages nor constraints on the contingency fee system, thereby making no change to the way our legal system operates. In short, S. 640 places responsibility where it belongs -- as determined by the court.

The product liability situation facing general aviation is very serious. Prompt action on this bill could be instrumental in helping resuscitate the U.S. general aviation industry and helping it regain the preeminent position it occupied just a few years ago. Failure to take such responsible action may well contribute to the death of a once thriving domestic industry.

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August 8, 1989

The Honorable Ernest F. Hollings, Chairman
Senate Committee on Commerce, Science & Transportation
Washington, DC 20510

Dear Mr. Chairman,

This letter is in response to yours of July 21, 1989, with which you transmitted a number of questions relating to the Aviation Subcommittee's hearing on the General Aviation Accident Liability Standards Act. As requested, the attached answers are paired with the text of each of your questions.

We were somewhat surprised to receive such a burdensome list, especially since much of the data has been provided to the Committee previously and the Committee has favorably reported this bill in the past two Congresses. We have tried to be responsive, but in some instances, the data is just not available. We sincerely hope this will complete the record and enable the Committee to take final action on S. 640 at the earliest possible date. The general aviation industry desperately needs a return to an atmosphere of fairness and predictability that this bill would foster.

We thank you for your past understanding and support.

Sincerely,

Ed

Edward W. Stimpson
President

Enclosure

POST-HEARING QUESTIONS OF SENATOR HOLLINGS FOR GENERAL AVIATION MANUFACTURERS ASSOCIATION

1) Q: As currently drafted, S. 640 would appear to apply to helicopters, hot air balloons, hang gliders, and certain military aircraft. Is this your understanding of the effect of the bill? Please specify each type of aircraft that you believe will be covered by the bill, including each specific type of military aircraft.

A: Our understanding is that S. 640 would not cover hang gliders (or ultra lights), since they are neither certificated by the FAA nor are they issued an airworthiness certificate. It would apply to hot air balloons that carry FAA certification. It would apply to all fixed and rotary wing (helicopters) aircraft which, at the time of original certification, had a maximum seating capacity of less than 20 passengers and which were not, at the time of the accident, engaged in scheduled passenger carrying operations. It most likely would not apply to any military aircraft, including those which are military versions of civil general aviation aircraft that have a type certificate. Such aircraft are "public aircraft" which means they are not required to have either a type certificate or an FAA airworthiness certificate under the Federal Aviation Act of 1958. However, it is conceivable that a court would find that they are covered on grounds that the aircraft is identical (or almost so) to an FAA certified aircraft. If your request for "specific type" aircraft data means individual designators such as Cessna 152, Piper PA-18, Beech A36, etc., such a list would include hundreds of aircraft, most of which are no longer in production. However, we are enclosing a booklet that describes many of the airplanes that would be covered. (Attachment 1)

1/ The attachments were retained in the Committee files

2) Q: Please provide all information in your possession or available to you about the safety record of each type of aircraft listed above and any additional type of aircraft which you believe would be covered by S. 640. Please provide such information for each calendar year from 1978 through 1988. Such information should include, but not be limited to, the accident rate and the number of deaths and injuries for each year.

A: Aircraft accident data is available on the specific categories of aircraft that would be covered by S. 640: single and multiple reciprocating engine, turboprop and turbojet fixed-wing aircraft, reciprocating and turbine-powered rotorcraft, and balloons. (National Transportation Safety Board [NTSB] Annual Review of Aircraft Accident Data, October 25, 1988) Copies of the relevant pages are attached. (Attachment 2)

3) Q: For each of the members of GAMA, and for each non-member manufacturer of helicopters, hot air balloons, hang gliders, military aircraft and other types of aircraft covered by S. 640, please provide the following information for each calendar year from 1978 through 1988:

(a) the total number of accidents involving such aircraft in which there was a personal injury;

(b) the total number of claims for personal injury brought against the manufacturers of such aircraft;

(c) the dollar amount of claims for personal injury closed with payment;

(d) the number of personal injury claims closed without payment;

(e) the amount of direct, out-of-pocket, legal and administrative costs incurred to defend or otherwise respond to product liability claims for personal injury, broken down by category of cost;

(f) the number of product liability claims currently pending and the total dollar amount of those claims;

(g) the number of product liability lawsuits for personal injury initiated, the number of such suits won by plaintiff, the number of out-of-court settlements, and the number of such suits won by the manufacturer;

(h) in each claim for personal injury paid by the manufacturer in which a verdict was, at any time, rendered, (1) the dollar amount of the original verdict against all parties; (2) the dollar amount of the original verdict against the manufacturer; (3 the dollar amount paid after post-verdict settlement or appeal by all parties; and (4) the dollar amount after post-verdict settlement or appeal paid by the manufacturer. Include in your answer the year of the original verdict and the year of the actual payment.

A: GAMA does not have access to any data on companies engaged in the manufacture of helicopters, hot air balloons, hang gliders and military aircraft. Hence, that information is not available through GAMA.

Some of the specific data requested on GAMA companies is not presently available. GAMA has been trying, unsuccessfully, for several months to get data from its member companies to update aggregate industry statistics. Unfortunately, we do not have data that specifically responds to each detailed request, but we are pleased to provide relevant comments where possible:

(a) All accidents involving fatalities and personal injury are investigated by the NTSB and contained in their detailed annual reports. Copies of fatal and personal injury accident statistics from NTSB's latest General Aviation report are included. (Attachment 3)

(b) The total number of claims for personal injury may be available through the Association of Trial Lawyers of America (ATLA); GAMA does not have access to the requested information.

(c)&(d) Personal injury claims closed with and without payments may also be available through ATLA.

(e) Direct out-of-pocket costs incurred by one major manufacturer (Beech) in defense of product liability claims in 203 cases averages $530,000 per case. The relevant study is informative and is included as Attachment 4. Piper spends on average over $500,000 to defend a major case. Moreover, they report expenses of "well over $200,000 per month in attorney fees, charges for expert witnesses and related costs." (Attachment 5) Total industry experience is contained in a report compiled by the Wyatt Company in 1986. This is the latest, most comprehensive data available, and we have included a graph which compares the Wyatt cost figures with the industry's fatal accident statistics -- irrefutable evidence of unwarranted escalation in general aviation products liability costs. (Attachment 6)

(f) A sampling of 3 airframe manufacturers on current, pending cases reveals 204 cases totaling an estimated $1.7 billion in claims.

(g)&(h) The detailed case-by-case assessment of literally thousands of cases that these questions would require has never been made, to the best of our knowledge.

4) Q: Please state the number of cases arising out of personal injuries for each calendar year since 1978 in which a general aviation manufacturer has been found liable for punitive damages after the conclusion of post-verdict appeals. For each such case, state the dollar amount paid by the manufacturer, and provide the case citation or the court's slip opinion.

A: Answers provided by a sampling of airframe manufacturers vary from zero to a few. It is not the actual award of punitive damages that is so troublesome; allegations of conduct deserving punitive damages often expose a defendant to other types of scrutiny which can frustrate and complicate the legal process, inflame a jury, and add to defense costs.

5) Q: Please state the number of cases for each calendar year from 1978 through 1988 in which a general aviation manufacturer has been found liable and actually paid damages for personal injury based on an aircraft that was more than 20 years old. Please state the dollar amount paid in each such case, and provide the case

citation or slip opinion.

A: This data is not presently available. However, the chairman of Cessna Aircraft recently stated that of 200 pending product liability cases, almost 20 percent involve aircraft 18 years or older at the time of the accident, and 46 percent involve airplanes over 10 years old.

6) Q: Please state the percentage of all general aviation aircraft currently in use which are aircraft over 20 years old. Additionally, please state the average age of the general aviation fleet currently in use.

A: Thirty-eight percent (79,800) of the aircraft in the fleet of 210,000 aircraft are over 20 years old. The average aircraft age is 22.1 years.

7) Q: Please state the number of cases, for each calendar year from 1978 through 1988, in which a court or jury found a general aviation manufacturer liable for personal injury and also found another party or parties liable. Please indicate any of these cases in which the proportion of the damage paid by the manufacturer exceeded its proportional responsibility as found by the court, and, for each such case, state the excess amount paid and provide the case citation or slip opinion.

A: The requested data is not presently available. We are advised that a substantial number of verdicts returned during 1978-1988 did not allocate fault among the various defendants, making the excess payment question moot. In practice, the manufacturer typically gets sued because of his perceived "deep pocket." Due to settlements by other defendants and for novel theories introduced by plaintiff's attorneys, the manufacturer often ends up paying more than his fair share.

8) Q: The general aviation industry has provided information to the Congress in the past about price increases for each new aircraft that are attributable to product liability costs. Are the product liability costs used in those calculations in fact caused by all of the aircraft still in use, and not just by the new aircraft sold? If so, please state, in 1988 dollars, the dollar amount of product liability costs attributed to each aircraft when calculated based on each aircraft currently in use. Additionally, please state, in 1988 dollars, the average before tax and after tax profit per aircraft for the entire fleet currently in use.

A: Aircraft product liability cost elements quoted by the industry were computed very simply: in any given year, dividing the total industry product liability cost figure by the number of airplanes delivered yields the per unit liability cost burden. In 1985 -- the last year for which comprehensive product liability cost figures are available -- industry product liability costs of $210 million divided by the 2032 units delivered yields a quotient of $103,000, the average per unit product liability cost. The total costs are based on total fleet experience, but the recovery of those costs is possible only through new unit sales. One individual company computing its own per unit costs calculated $70,000, which accounts for the range of figures given in prior testimony. The average before and after tax profit for every aircraft in the entire fleet is not available.

9) If S. 640 were enacted into law, please state your best estimate of its effect on the price of piston engine aircraft. Would the price decrease, and if so, by what percentage? Please provide the same information with respect to turbine-powered aircraft. Please provide such information for each aircraft model if such a breakdown will facilitate a more accurate response.

A: Our best guess is that the near-term effect on piston and turbine engine aircraft would be a small decrease in price. After living with the new law for a few years, it is reasonable to expect that insurance rates would go down and that a significant decrease in prices could be realized. Additional near-term advantages to be realized would be the continuation of current production which is threatened today by the product liability system, the resumption of production of certain models that are currently out of production, and increased competition against foreign manufacturers from France, Germany, Korea, Brazil and others that have designs on the U.S. general aviation market. At the 1989 Paris Air Show, the Cessna chairman stated that if S. 640 would pass, Cessna -- within 24 hours -- would announce the resumption of piston engine aircraft production. (Attachment 7)

10) Q: Do you agree, as the Department of Justice an others have suggested, that S. 640 could be read to alter certain provisions of the Federal Tort Claims Act? Specifically, even though the bill preserves the defense of sovereign immunity asserted by the United States or any State, could it be read to conflict with, or preempt, provisions of the Federal Tort Claims Act (FTCA) in litigation involving the Government?

A: S. 640 is not intended to modify the FTCA. The Department of Justice has proposed a simple addition to S. 640 which would eliminate a potential conflict with the Federal Tort Claims Act. GAMA concurs with this proposal change.

11) Q: Testimony before the Commerce Committee has indicated that the major general aviation manufacturers are uninsured or self-insured to a certain extent. Please state, for each member of GAMA, whether these insurance arrangements are due to the unavailability of commercial insurance coverage. If not, please state the reasons for selection of these insurance arrangements.

A: Testimony indicated GAMA airframe manufacturer Piper is fully self-insured, while Cessna and Beech are currently self-insured for $50 million each. These arrangements were due to the cost and/or availability of commercial insurance; in some cases insurance was not available at any price. Commercial insurance at lower levels is probably available today, but not at acceptable premium levels. Moreover, our manufacturers prefer to maintain control of their cases, to fight or settle as they see fit. They are reluctant to delegate this to insurance companies -- especially considering the many uncertainties in aviation products liability.

Senator FORD. Thank you very much, Mr. Martin.

I have two or three questions I would like to ask, and I am sure Senator McCain would like to delve into your opinions also.

I think we have a figure that probably everybody generally agrees on, and that is the domestic manufacturing base that has substantially been eroded over the last ten years, which in part is a result of the skyrocketing product liability costs.

In your view, Mr. Martin, what will happen if we do not enact legislation providing the kind of relief that is proposed in S. 640?

Mr. MARTIN. The foreign manufacturers will supply the largest percentage of the single-engine airplanes, the piston-driven airplanes, the entry level airplanes, and they will continue to invade that market until they supply 80, 90 percent of it.

We will lose that market, and we will lose our technology. That is the first thing that I think is going to happen.

The next thing that is going to happen is that airplane manufacturers, such as Beech and Cessna and to a lesser extent perhaps Piper, are going to gradually become manufacturers of nothing but pure jets and turboprops, corporate class airplanes, and government contractors. They are going to become big engineering companies and wait until their existing fleet of airplanes dies.

By that time, the foreigners will be well established in the market and they will not be able to re-enter. I think that is what is going to happen.

I think we are going to exacerbate the shortage of pilots and we are going to impair the general aviation contribution to the national transportation system.

I do not believe that the French and the Brazilians and the Koreans and the West Germans are going to build better airplanes. I think they are not going to build as good an airplane, and in the long run I think safety will suffer. That is my answer to what I think is going to happen.

Senator FORD. I find in my small community of 60,000, Mr. Martin, that most of those who are learning to fly, getting into these single-engine aircraft and so forth, are the more affluent in my community. They are doctors and lawyers.

Beyond that, we find very few that are willing to, that have the ability or financially can get into the private aircraft arena.

One of the things that I want you to answer for me is, while the number of units delivered in 1988 continued to decline, the value of the aircraft billings increased from 1987 by, my figures are, close to 45 percent. What does this mean relative to our debate over the need for tort reform legislation?

Mr. MARTIN. Your figures are approximately right. The dollar value of total sales went up about 40 percent. The units, as I mentioned, only went up four percent. The accounting for that is very simple. What the U.S. manufacturers are making is the corporate jet.

I might say to you that about 40 percent of the sales were of the Gulfstream class airplane. These are $20 million corporate airplanes. Even doctors and lawyers cannot afford those airplanes.

That is what is happening to the industry. What that demonstrates, the difference between the dollar value of the industry's sales and the unit value of the industry's sales, is basically what I premised the answer to the previous question on.

We are going to become nothing but pure jet and turboprop manufacturers making government sales and huge corporate sales, and we are going to be out of the individual market. That is what that number says.

Senator FORD. One of the things I was interested in—I think you made it very clear, Mr. Martin, was who would take up the slack that we are not building? And it is the foreign aircraft, and they are moving in and moving in very fast. This free trade country, you know, lets them all come and do things to keep ours from being competitive.

As you say, we do the research and development, but we are not doing very well keeping it in the marketplace.

In your statement you refer to the fact that over half of the piston engine-powered aircraft are more than 22 years old. Does this mean that this bill's 20-year limitation on liability will leave a gap in compensation to victims of accidents? Is that a problem that should be addressed in this legislation?

Mr. MARTIN. The 20-year statute of repose that appears in this bill is undoubtedly going to outlaw some claims. I am not going to argue to you that it does not. I will say, however, that the statute of repose here is a running statute, which says that any system or component or part that is replaced, the 20 years starts anew from the date of replacement.

Now, a 20 year old general aviation airplane has got a lot of replaced parts and systems in it. So it is not going to be an absolute rule, but there must be some reasonable cutoff.

Those airplanes are obsolete because the technology has changed so fast. They are usually fourth or fifth owner airplanes, many of them with terribly poor maintenance.

And I think that what we may lose in terms of actions against the manufacturers we will over time more than pick up in imposing the economic responsibility for loss where it belongs.

That is, if the owners of the airplanes and the fixed base operators who are required to maintain it are required to carry adequate insurance coverage and develop the habits of caring for their airplanes or not flying for them, accidents are going to decline; and those who are injured because an airplane is not maintained, they are going to file and try the right lawsuit, that is against the fellow who did not maintain it, and that is what is wrong here now.

The state courts and the various jurisdictions are hunting for ways, with unbelievable ingenuity, to take a lack of maintenance or a failure to comply with inspections that had been directed by the manufacturer and sometimes the FAA and imposing the liability of that on the manufacturer, on the theory that he can insure cheaper than the individual, which is a fallacious theory.

I could cite you to a paper by Mr. Priest of the Yale Law School, I believe, that demonstrates exactly why that is a felonious theory.

I do not think it is going to leave a hole that needs to be covered. I think it is going to improve the overall administration of justice in terms of airplane crashes.

Senator FORD. Thank you, Mr. Martin.

Senator McCain.

Senator McCain. Thank you, Mr. Chairman.

Mr. Martin, what percent of the industry is self-insured? Have you got a guess on that?

Mr. **Martin**. I have better than a guess. I can give you the numbers.

Beech is self-insured up to $50 million annual aggregate loss and defense costs, which historically includes 100 percent of our annual loss and defense costs. We pay it all. And we have excess insurance above $50 million. Cessna I am told is, and I believe this to be correct, that they are uninsured to $100 million, which I am sure covers all of their loss.

Piper is absolutely naked. They have no insurance coverage whatsoever. They are making a valiant effort to stay in business, and they are going to stay in business until they get tagged and then somebody is going to sell the plant, unless that situation changes.

That is the situation. Those are the big three. Worse than that, however, is the small manufacturer of systems and components, he is uninsured. And he will not take the risk. And one of the big cost drivers that is not included in the figures that you see, but one of the enormous cost drivers, is the requirement by the U.S. manufacturers to replace suppliers who say: I make automotive parts or I make boat parts as well as aviation parts; I am going to quit making aviation parts because my insurance costs have gone through the roof, or I am totally uninsured and I cannot bet the farm every time I turn out a piece.

It costs us thousands of dollars to replace one of those, one of those people that has supplied us parts for years. That is a hidden cost that is driving up the cost of these airplanes. We have no stability in our vendor base.

Senator McCain. Perhaps you could provide us for the record some examples of that trend.

Mr. **Martin**. Well, to give you one that comes fresh to mind, several years ago Beech had what you and I would look upon as a bicycle chain that went over a sprocket that controlled the ailerons in its single and twin engine airplanes. We had that manufactured. I do not remember the name of the supplier. We do not build those in the Beech plant.

He said: I am going to quit building them. I can build bicycle chains and that does not cause any problem, but when I build your chains I either am uninsured or I am going to have to charge you an unrealistic cost.

We had to go out and replace that supplier. Many of those suppliers, by the way, are overseas suppliers. We had the same problem with Heim rod ends that you operate the controls with. We have had that all the way through the whole airframe.

But those are examples of what I am talking about.

Senator McCain. Can you give us a rough R&D picture of what is going on overseas and what is occurring in the United States?

Mr. **Martin**. Well, what is going on overseas is simply that we finance our own R&D costs. We do not get any government grants. All the foreign competition has government grants.

How can we compete with that? The answer is we cannot. Beech spent $300 million developing the Starship. We paid the whole bill.

We do not have a competitor for the Starship except for the Italian airplane. I do not know how much of that was financed by the government, but I would say a substantial share, I am sure, a substantial share of the R&D was government underwritten.

Even little Mooney, although it is privately owned by the French, it gets government grants to do R&D work. That is another complicating problem.

Not all of those problems are going to be cured by this measure. But if we can just get a fighting chance to get out from under this load, I think that our industry can cope with those problems. Without it we do not have a chance.

Senator McCain. Do you have any figures on the number of individuals receiving a private pilot's license today versus ten or 20 years ago?

Mr. Martin. No, sir, I do not.

Senator McCain. Maybe we should get that from the FAA.

Mr. Martin. I think it would probably be an interesting figure. I have seen some figures, but I do not have them committed to mind. I know that it is down.

[The following information was subsequently received for the record:]

Active U.S. Pilot and Non-Pilot Certificates Held
(as of December 31, year indicated)

Category	1974	1975	1976	1977	1978	1979	1980[1]	1981	1982	1983	1984	1985	1986	1987	1988
Pilot—total	**733,728**	**728,187**	**744,246**	**783,932**	**798,833**	**814,667**	**827,071**	**764,182**	**733,255**	**718,004**	**722,376**	**709,540**	**709,118**	**699,653**	694,016
Student	180,795	176,978	188,801	203,510	204,874	210,180	199,833	179,912	156,361	147,197	150,081	146,652	150,273	146,016	136,913
Private	305,848	305,863	309,005	327,424	337,644	343,276	357,479	328,562	322,094	318,643	320,086	311,086	305,736	300,949	299,786
Commercial	192,425	189,342	187,801	188,763	185,833	182,097	183,442	168,580	165,093	159,495	155,929	151,632	147,798	143,645	143,030
Airline transport	41,002	42,592	45,072	50,149	55,881	63,652	69,569	70,311	73,471	75,938	79,192	82,740	87,186	91,287	96,968
Helicopter (only)	5,647	4,932	4,804	4,819	4,874	5,218	6,030	6,453	7,034	7,237	7,532	8,123	8,122	8,702	8,608
Glider (only)[2]	4,824	5,348	5,789	6,208	6,541	6,796	7,039	7,388	7,842	8,157	8,390	8,168	8,411	7,901	7,600
Lighter-than-air[2]	3,187	3,132	2,974	3,059	3,186	3,448	3,679	2,976	1,360	1,337	1,166	1,139	1,133	1,153	1,111
Nonpilot—total[r]	**314,394**	**323,934**	**334,681**	**348,584**	**362,350**	**377,213**	**393,486**	**398,368**	**420,595**	**432,890**	**447,462**	**412,741**	**410,079**	**427,962**	448,710
Mechanic[3]	198,863	205,436	212,303	220,768	228,743	237,611	250,157	262,705	277,436	288,355	298,028	274,100	284,241	297,178	312,419
Parachute rigger[3]	7,900	8,327	8,718	8,994	9,200	9,831	9,547	9,716	9,893	10,074	10,194	9,395	9,535	9,659	9,770
Ground instructor[3]	49,249	51,365	53,464	55,717	57,738	59,680	61,550	63,246	65,004	66,385	67,463	58,214	59,443	60,861	62,582
Dispatcher[3]	5,576	5,741	5,838	5,972	6,161	6,446	6,799	7,094	7,580	8,223	8,980	8,511	9,025	9,491	10,020
Flight navigator	2,509	2,321	2,214	2,155	2,092	1,994	1,936	1,785	1,695	1,636	1,603	1,542	1,512	1,145	1,400
Flight engineer	26,955	26,788	27,560	29,871	33,028	36,869	38,367	38,294	38,053	38,546	40,534	43,377	46,323	49,328	52,519
Flight instructor certificates[4]	42,418	44,777	46,236	49,362	52,201	54,398	60,440	57,523	62,492	62,201	61,173	58,940	57,355	60,316	61,798
Instrument Ratings[5]	199,323	203,954	211,364	226,334	236,312	247,096	260,461	252,535	255,073	254,271	256,584	258,559	258,845	266,122	273,804

Source: FAA

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[1] For 1980 only, a valid medical certificate was defined as one that was issued within the last 27 months.

[2] Glider and lighter-than-air pilots are not required to have a medical examination; however, the totals above represent pilots who received a medical examination within the last 25 months.

[3] Numbers represent all certificates on record. No medical examination required.

[4] Not included in the total.

[5] Special ratings shown on pilot certificates which do not indicate additional certificates.

[r] Revised.

Table 1.--Active Pilot Certificates Held: December 31, 1966-1975

Category	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975
Pilot--total ...	548,757	617,931	691,695	720,028	732,729	741,009	750,869	714,607	733,728	728,187
Student	165,177	181,287	209,406	203,520	195,861	186,428	181,477	181,905	180,795	176,978
Private	222,427	253,312	281,728	299,491	303,779	312,656	321,413	298,921	305,848	305,863
Commercial	131,539	150,135	164,458	176,585	186,821	192,409	196,228	182,444	192,425	189,342
Airline transport	23,917	25,817	28,607	31,442	34,430	35,949	37,714	38,139	41,002	42,592
Helicopter (only)	1,819	2,573	3,166	4,286	6,677	7,992	7,987	5,968	5,647	4,932
Glider (only) ...	1,602	1,866	2,193	2,627	3,114	3,571	4,080	4,288	4,824	5,348
Lighter-than-air.	2,276	1/2,941	2,137	2,077	2,047	2,004	1,970	2,942	3,187	3,132
Non-pilot--total	217,132	231,801	250,151	269,775	289,681	307,057	r/315,348	304,747	314,394	323,934
Mechanic1/.......	140,799	146,572	158,211	170,716	184,647	193,295	201,700	193,337	198,863	205,436
Parachute rigger1/	4,927	5,347	5,700	6,070	6,424	6,839	7,287	6,941	7,900	8,327
Ground instructor1/	32,217	34,262	37,889	41,234	44,176	46,145	48,450	46,827	49,249	51,365
Dispatcher1/.....	4,259	4,441	4,766	5,026	5,293	5,480	5,637	5,527	5,576	5,741
Control tower operator	16,046	17,425	18,610	19,851	21,032	26,450	r/23,353	23,250	23,342	23,956
Flight navigator	2,384	2,801	2,966	3,011	2,950	3,052	2,957	2,636	2,509	2,321
Flight engineer	16,500	20,863	22,009	23,867	25,159	25,796	25,964	26,229	26,955	26,788
Flight instructor certificates	38,897	44,421	30,361	33,992	37,822	37,760	37,858	36,795	42,418	44,777
Instrument ratings2/	107,171	122,573	139,346	155,879	169,848	179,261	187,909	185,969	199,323	203,954

SOURCE: FAA

1/Numbers represent all certificates on record. No medical examination required; no determination as to activity can be made.

2/Special ratings shown on pilot certificates, i.e., do not indicate additional certificates.

r/Revised

Senator FORD. Excuse me, Senator.

What, we are going to need is 90,000 new pilots between now and the turn of the century, something similar to that. And we are just absolutely going to run into the same problem with the pilots you are running into with building airplanes, and that is a domino effect on what is happening to us.

I apologize for interrupting, but it is more serious. There is a bigger picture, that this is the cancer and it is beginning to spread.

Mr. MARTIN. There is a much bigger picture, and an add-on to that picture is that there are areas of the world, there are areas of our country—Alaska is a clear, clear example; they depend on general aviation for most of their transportation.

Even we in Kansas depend on general aviation. There is lots of places we cannot get. You either drive or fly a general aviation airplane. There is no other way to get there.

But the rest of the world is like that. We should be exporting these products. We should not be importing them; we should be supplying the rest of the world with its transportation machines.

Senator McCAIN. You raise a good point, Mr. Chairman. And I think the other point is your state, like my state, has some rural areas and airports. 20 years ago you and I would go to one of those airports and the young men and women going up for flights——

Senator FORD. On a gravel runway. Now we have blacktopped the runway and there is nobody there.

Senator McCAIN. That is right.

Mr. MARTIN. That is exactly right.

Senator McCAIN. We cannot afford to get a ride. Well, I guess we have probably covered that.

I just have one final question, Mr. Chairman. What percent of the recent increase in sales is piston-driven aircraft, as opposed to, as you mentioned, corporate jets?

Mr. MARTIN. In terms of dollars or units?

Senator McCAIN. Units I think would be—both if you have got them.

Mr. MARTIN. I do not. I do not have precise figures in terms of units. The only increase in sales of light piston-driven airplanes comes from Piper. Beech is stable. We sell about 40 Bonanzas a year, maybe a little bit more than that. Cessna is out of the single engine piston-driven business.

Senator McCAIN. You say there are about 40 Cessnas?

Mr. MARTIN. About 40 Beech Bonanzas a year.

Senator McCAIN. Oh, Bonanzas.

Mr. MARTIN. Piper is selling some single engine entry level airplanes.

Senator McCAIN. And they are uninsured.

Mr. MARTIN. And they are totally uninsured, and I think they are selling those at very attractive prices. And how long they can walk that knife edge I do not know. I am not very optimistic about it. They have got to have some help.

Senator McCAIN. Thank you very much.

Thank you, Mr. Chairman.

Senator FORD. Thank you, Mr. Martin. Your previous testimony is also in the record and we are grateful to you for making this trip today, and we look forward to working with you in the future.

Mr. MARTIN. Thank you.

Senator FORD. Our next witness is Mr. Bill Wagner, President of the Association of Trial Lawyers of America. He is with the law firm Wagner, Cunningham, and Vaughan of Tampa, Florida. Mr. Wagner, we are delighted to have you here today and we look forward to your testimony.

You can have the full statement in the record and highlight it, and then we will ask you some questions, whatever you would like to do.

STATEMENT OF BILL WAGNER, PRESIDENT, ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Mr. WAGNER. Thank you very much, Senator. I appreciate the opportunity to appear here.

As you have probably noted, I am here substituting for Mr. Charles Hvass, who actually prepared the statement that we will submit for the record. And in all candor, he was only at the last minute unable to get here and I was asked last night to appear, so I will apologize in advance for perhaps a somewhat less than polished presentation before the group.

Senator FORD. They just sent a country lawyer, I understand all of that.

Mr. WAGNER. Thank you very much.

I would ask, however, that Mr. Hvass' statement be accepted for the record.

Senator FORD. Without objection, it will be included in the record in full.

Mr. WAGNER. I have reviewed the statement and I agree with its contents. He comes from perhaps a little bit different state.

Before I go any further, I would like to mention, Senator McCain asked a question concerning the number of student pilots and the impact of liability costs. The Department of Transportation recently produced FAA's evaluation and forecast for the fiscal years 1989 to 2000. Chapter 5 of that document deals with general aviation and in part with the general aviation pilot population.

Of significance, there are a great number of statements made in this document concerning the costs and the problems within the general aviation industry. Only passing reference is made by the FAA to liability problems as one of the industry's problems. And I would ask that this document be made a part of the record, and particularly that chapter, chapter 5, since I think it is of significance that we have some of the facts available.

Senator FORD. The document will be included in the record, by reference[1] but will not be reprinted.

Mr. WAGNER. Thank you, sir.

Senator MCCAIN. And if I may respond before you get into your statement, it does in some degree—and I have not read it; I will read it with great interest—contradict the view of the Secretary of Transportation and others that work for him concerning this particular legislation and this particular problem.

So I would be interested in reading it.

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[1] See FAA-APO 89-1, March 1989, DOT, FAA publication.

Mr. WAGNER. I have not read the entire document. I have only read the chapter on the general aviation industry. But at least in terms of the assessment by the FAA of those things which they consider to be problems within the general aviation industry, there are a great number of problems referenced therein, with liability being only a passing reference.

Senator McCAIN. Thank you.

Mr. WAGNER. I am here as President of the Association of Trial Lawyers of America, and I guess, having heard what was said before me, I am a little nervous to appear here. Our scheduled witness appears to have gotten sick and I am beginning to worry about my own health, having heard what has been said about us. But I shall attempt to present the statement.

I am here also because I am a private pilot, and I have been a private pilot since 1962. Also, I own a Beechcraft aircraft, a twin-engine Beech Baron. It was manufactured in 1964. It is therefore 25 years old and it is still flying passengers, and I have even had the privilege of having a United States Senator as a passenger in my aircraft, so I am sure there is more than passing interest.

Senator FORD. Past or present?

Mr. WAGNER. Past, sir. Not voting on this committee, sir.

My aircraft is 25 years old and it has some 3,000 hours accrued on it. To put that in context, a good commercial aircraft today gets that amount of time in about nine months of operating under normal circumstances.

So this addresses one of the issues you have referred to, which is a time limit on recovery. My aircraft, with 25 years, has 3,000 hours. Some commercial aircraft get that much time in nine months.

Senator FORD. But would not the commercial aircraft be a different type airplane, be a jet, compared to your twin Baron? That would be number one.

And two, would there not be more rigid inspections on that commercial aircraft than there would be on your Baron?

Mr. WAGNER. Not necessarily, sir. Now, if you compare a 747 to my Baron, yes, sir. But you are drawing the line in this bill at 20 passengers, and there are a large number of commercial aircraft that are used in the commercial scheduled system, under 20 passengers, which are also used as private general aviation aircraft for corporations and for flying representatives around the country.

The description of below 20 would apply to most of the corporate jets. All of those are below that amount, and yet they require, as a jet aircraft, different inspections, much as a 747 does.

I bought my aircraft, used, in 1969. I mention that because I think it is of significance with regard to the reason this industry has had some problems. In 1969, when I bought it, my aircraft was five years old. And I bought it used because its cost then was about a third of the cost of a new aircraft.

Why? Because the market was essentially flooded with Beech Barons and similar competitive aircraft. I was able to buy it at a used price, at less cost, and it was just as good an aircraft as the brand new ones coming out then. This was at the peak of prices, when they were beginning to go down.

Since that time, on several occasions I have thought, do I want to buy a brand new Beech Baron? They are still manufacturing Beech Barons. And in each case I have decided, no, I will upgrade my own aircraft. At the present time, my aircraft on the retail market, the used market out there, costs about one-tenth the retail cost of a brand new Beech Baron.

Yet when I chart it out, compared to my 25 years old model, I would only get to Miami ten minutes earlier from Tampa, Florida, where I live, if I bought a brand new Beech Baron.

I am also here today because I represent injured people and the survivors of those killed, and occasionally also represent pilots who have disputes with the FAA, and even occasionally represent general aviation people, such as fixed base operators, who need legal services in that area.

I do not want to restate Mr. Hvass' comments, but I would like to highlight a couple of them from my perspective, if I may. He lists some of the reasons why he has concern with the bill's reliance on FAA standards regarding acceptance and certification, to at least establish a standard that a jury could consider, which I might submit has a high degree of weight for a jury.

He mentions the problems of the minimum standards that were used for the V-tailed Bonanza and the Cessna 411. From a personal standpoint, I can tell you something else about that certification problem.

When I received my aircraft, it had a list of what we call the numbers: the speed by which you can fly the aircraft when it has a single engine with the flaps down, with the flaps up, with the wheels down. These are a list of minimum safe operating speeds under the conditions.

Because I am in the business I am, I have learned, I have found that that certification process involves the manufacturer having a highly qualified, skilled test pilot, flying in absolutely the best conditions in the world, meet that test on, I believe it is, three occasions, under the most ideal conditions.

Then the number goes in there as being the minimum safe standard. And yet, the very people who fly the smaller aircraft are the people who are not the most skilled pilots, who are not the expert test pilots, and they are also not always able to fly them under the ideal conditions. They fly them in everyday conditions.

I am also concerned at the FAA resources, and since this committee has FAA jurisdiction let me suggest to you the real practicalities of how airworthiness directives are sometimes issued. I had a case recently in which a small aircraft crashed and it was investigated by the FAA, and the report went all the way up through the NTSB and was approved by the NTSB, with a reference in this investigation to the fact that improper valve springs had been used in the engine.

After an extensive amount of time and an extensive amount of discovery, we found out that these were not the improper valve springs at all. They were valve springs that were proper.

Yet, because of the amount of resources that the FAA had to devote to the investigation of this small aircraft accident, as compared to the resources it has to devote to the large aircraft accidents, the ones many of us are familiar with because we see them on television, the erroneous information got into the system and is erroneously in the computer right now concerning those "improper" valve springs.

Respectfully, then, to test each individual's right to recovery based upon what might very well be erroneous is, we feel, unfair. It is unfair not only to that particular operator, the person who is hurt in this accident, but to those who might be affected by the issuance of airworthiness directives (or the failure to issue airworthiness directives later) because of the inability to fully and completely investigate these matters.

Mr. Hvass also comments that he is worried about the standard of liability regarding aircraft used "for their intended purpose." He expresses at great length his concern with the question of crashworthiness.

Let me give you an example which I think will focus on this. Recently an aircraft, a Braniff aircraft approaching Orlando went through some very severe weather and, surprisingly, three of the seatbelts in the Braniff aircraft did not break, they just slipped out of their retainer, the place where the seatbelt attaches to the seat and to the floor.

Upon examination by the FAA, they found that the retainers, somehow, during the use of that aircraft had just been twisted 180 degrees, and therefore the seatbelts were able to slip out.

The retainers and the manner in which they are installed and the seat belt itself were all certified by the FAA. They just had not realized that in the operating or the use of it the retainer might be turned backwards.

That was found in that aircraft, and I went home and looked at my aircraft because, although I did not have the identical type seatbelts, I had similar retainers. And sure enough, one of the eight retainers in my aircraft had turned around backwards, and I corrected it.

Now, respectfully, I do not know, first, why under "the intended purpose" design standard, that the person who designed the retainer should be able to escape liability because he intended that this seatbelt be installed with the retainer up why should we have to pass on the liability to someone else?

Secondly, I am not sure why it would be fair in this circumstance, where the manufacturer and designer of that retainer and the seatbelt clearly would be liable to the commercial airline passenger, for them not to be liable to my passenger, who is using the aircraft to get that short distance transportation on a non-scheduled, non-commercial status.

Mr. Hvass discusses briefly the concept of comparative negligence, and my story about the aviation springs raises that issue because in that particular case, under our particular laws in Florida, when the insurance company representing the person who was obviously responsible in that case, which by the way in my judgment and in the judgment based on the final settlement, was the instructor pilot who was flying the aircraft, when that insurance company found that there might be something wrong with the manufacture of the springs, it sued the manufacturer of the springs, the overhauler of the engine, the inspector of the aircraft.

Only one of those parties had no insurance. Well, of course, to the one who had no insurance, as we got on through discovery, they started to push the blame on him because he had no one to defend him.

But realistically, for those who did have insurance, their insurance costs went up—created by a situation in Florida in which Florida, in an effort to question this area of comparative fault or joint and several liability, adopted a modified form of comparative fault and comparative liability.

So far it appears the results in Florida are just as I have announced. It has resulted in more litigation for more parties, more expense, more costs for defendants, and unfortunately more costs for the plaintiffs.

I will not comment on the statute of limitations except to point out something that I think you should be aware of. Under current circumstances, before you can really get into an aviation case, you must wait until the FAA and the NTSB have completed their report. This is particularly so with regard to small aircraft.

Frequently, you cannot get into a case quickly because the FAA or the NTSB have the part, or have parts of the information, or have facts that are otherwise unavailable to you at a reasonable expense to your client. Often it is more than a year, not always, but often more than a year before the regulators complete their report.

To be limited in all cases to one more year to complete discovery and to find out whether or not they may have made a mistake or whether, through your investigation, other persons might be at fault is in effect to charge those with responsibility, at that early date, because you discover them within two years and excuse those who might be discovered later than two years.

I will just briefly comment on the statute of repose. I did some quick figures. I used my aircraft before I became President of ATLA about 100 hours a year. That was 2,000 hours total.

You have noticed I said I have about 3,000 hours on my aircraft. In 20 years it is 2,000 hours. I am now using it between 400 and 500 hours a year. A commercial aircraft would have 116,000 hours if it was used at the regular rate. I understand the Aloha airliner had something like 98,000 hours on it.

The point I feel is that it is not correct to use age as a defining feature for aircraft.

We have a test in law called the "reasonable expectations of the consumer," and I think that is a fair test. If the reasonable expectations of the consumer, such as myself when I bought my Baron, is that it is going to last effectively my lifetime, then that reasonable expectation ought to be met, unless the manufacturer wants to tell me and warn me in advance that it is not going to be responsible for this aircraft beyond that time.

What happens if we pass this bill? I made a list of what accountants will probably do when they sit in their rooms at various locations. The accountants are probably going to shift the defense costs in some insurance companies, including mine by the way, because my insurance company under the bill, even though their insured aircraft may be at fault, because of age, will suddenly be excused from liability in my case and therefore my own liability insurance will have to pick it up.

The small businessman who inspects my aircraft every year and who is insured, his insurance rates are going to go up also. So his accountant is going to have to add money because my aircraft is more than 20 years old; and as you have heard, apparently more than half of the aircraft sitting out there on the ramps and being flown by the average person today are over 20 years old.

The plaintiffs' costs may rise. They will for me. I know that if we adopt this bill I am going to have to hire a whole bunch of experts to not only testify as to whether this product is in fact defective, but also to apply the reasonableness standard to determine what could the manufacturer have done, even as short a time as five years ago, to correct the defect, which is why we say the negligence standard has been put into strict liability doctrine.

And some people, most of whom do not have accountants by the way, are not going to recover, as admitted previously. Those people who happen to be killed in my aircraft or an aircraft like mine, that is over 20 years old, either will not recover, or hopefully will have other places that they can recover.

And they have been deprived of the right to that recovery which otherwise exists.

As I say, they do not have accountants.

Small businesses, for example, the replacement part people, their insurance goes up. Small businesses, the maintenance people, their costs will go up. The inspectors, their costs will go up.

All of that will shift the costs from an accountant in the manufacturer someplace who says, well, whatever we reserved for those people that were hurt in our planes that are 20 years old or over, we shift from reserves over here to the profit line. Whatever we reserved for those parties that previously would have been 50 percent at fault, but now are not 50 percent at fault because it is over 20 years old, that shifts to the profit line, and it shifts 100 percent back down there to the small businessman who inspected and maintained and repaired that aircraft.

I hear repeatedly the statement: The owner is responsible for maintaining the aircraft. As a realistic fact of life, I am legally responsible under the law, but I pass that legal responsibility on to the operator of the general aviation facility, who is a significant, important person in our community, who is responsible for maintaining my aircraft, and who will pick up the burden of this shift.

I was interested in some of the comments concerning the competition from foreign sources. I have sued the manufacturers of foreign aircraft.

As it turns out, the aircraft that I told you about with the slipping seatbelt is a BAC aircraft, British Aircraft Corporation aircraft. They are not excused from liability over here. They are in exactly the same competitive situation insofar as that goes.

But significantly, the European Common Market has recently adopted a form of strict liability which will be much stricter than the liability that is applied here if this bill is adopted.

Senator **Ford**. But is it not for a shorter period of time, ten years?

Mr. **Wagner**. I have not seen that ten years, sir. I was interested to hear that. I think what was said was that they are considering a ten year limit. Obviously, we were considering a 12-year limit in the House not so long ago, and I do not know what will happen when this bill gets to the point where it is amended. They might be considering a four-year statute at some time.

Once they are passed, people consider all sorts of things to further limit their liability.

But in fact, they have adopted strict liability over there. And the accountants over there will say: Well, we have a limited necessity to apply strict liability to those aircraft we manufacture and send to the United States now.

I was interested in the discussions concerning the people who do not get to fly. I think the statistics here will show that that is a warped view, that all these poor people cannot learn to fly.

I will admit that the fellow who cleans up my garage does not learn to fly an airplane, but he did not learn to fly an airplane 25 years ago, either, and liability insurance does not have anything to do with it. But I insist——

Senator **McCain**. Have you ever met Colonel Borman?

Mr. **Wagner**. Pardon?

Senator **McCain**. Have you ever met Frank Borman?

Mr. **Wagner**. Never met him.

Senator **McCain**. That is exactly how he learned to fly, and a whole lot of other Americans, who hung around airports and got rides on airplanes and learned to fly that way, which they cannot any more.

He will testify to it, I will testify to it, and others of my generation will testify to it, sir.

Mr. **Wagner**. Well, sir, I would be more than happy to have my associate testify, I told him I want you to learn to fly, because you fly with me sometimes and I am getting to the age where I may have my heart attack, and I want somebody to be there to help.

And I said: You can spend the money to fly. And I found out it was a very competitive market. Within our market in Tampa——

Senator **McCain**. It is competitive? Now it is easy for someone to learn to fly?

Mr. **Wagner**. Absolutely, sir, in terms of the costs that he has come to me with.

Senator **McCain**. Perhaps at your income level that is the case, sir. It is not, certainly, as far as the income level of my constituents are concerned.

Mr. **Wagner**. No, sir. But I learned to fly in 1964 and I know what it cost me in 1964, and I have seen what my associate has come to me with as to costs currently, the cost of his learning to fly, either at Peter O'Knight, Albert White and three locations in St. Petersberg-Clearwater.

When you adjust for inflation, the cost is very little difference from 1964. If you adjust for inflation and take out the cost of using the airplane's gasoline, there effectively is *no* difference, the cost is effectively the same.

The cost today of training has been as much directed to the cost of new requirements for transponders, new requirements for specific types of radios which we must have, new requirements and expensive, expensive oil and expensive, expensive gasoline.

I know what my liability insurance costs me and I know what I spend a year to fly my airplane. Liability insurance is not what concerns me. What I do is read the list as I fly around the country and say, where can I get cheap gasoline? What state is charging too much? Can I land at this airport and get cheaper gasoline?

That is what drives my flying. That is what is driving my associate's flying. That is what is driving a lot of people's flying, not the interest in learning to fly.

Senator McCain. I apologize for interrupting you.

Mr. Wagner. And in all fairness, sir—I am sorry. And in all fairness, sir, the availability of alternate forms of transportation significantly drives our interest in learning to fly.

When I learned to fly back in Florida, the availability to me to go to various different places in the state was extremely limited because of the limited availability of commercial aircraft. As far as that goes, it was significantly affected by the availability of the interstate system.

As the interstate system has developed and allowed me to get from Tampa to Fort Myers, there is less of an interest for me to fly. And at least since deregulation, where I now have three competing airlines flying to Fort Myers, there is less of an interest for me to fly, although I love it and I would do it anyway.

But to my associate, he drives down to Fort Myers because it is easy. He catches one of four commercial flights down to Fort Myers. When I was there, I would have had to drive on 41, a narrow two-lane road, or I could fly my own plane. I could not go commercially.

So there are many other factors driving that.

I suppose the other thing that would happen if we passed this bill is that that my insurance would go up, and when I went out to try to sell my airplane the value of my airplane would have gone down significantly, because they would say, well, your aircraft is not protected by the good name of Beechcraft any more.

And perhaps Beechcraft would be giving me a call and saying, do you not want to buy a new airplane? And to the extent that that is good for the industry, I applaud it. But to the extent that we get that good for the industry by depriving those who in fact are going to be hurt and killed by defective aircraft in the future, that accountant's mechanism of moving from this pot to that pot to save an industry, I think is unfair.

Those in aircraft like mine may not consider this bill as having a cap, but if they are a passenger what they have and what they are facing is the ultimate cap, that is the inability to get any damages.

Thank you very much for your courtesy in listening to me, and I would be happy to answer any questions.

[The statement and questions and answers follow:]

STATEMENT OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Mr. Chairman and Members of the Committee, I am Charles T. Hvass, Jr. I am a partner in the Minneapolis law firm of Hvass, Weisman & King. I would like to thank you for the opportunity to testify and present my views on S. 640, the General Aviation Standards Act of 1989. I am former chair of the Aviation Section of the Association of Trial Lawyers of America and an active pilot. My perspective is different from many who are appearing before you because I testify from the standpoint of having witnessed the impact of aircraft accidents on my clients as well as my family.

I also come before you as one whose involvement in the litigation system has exposed me to the actions of those who through this legislation seek refuge from those actions. I would urge that the aid they seek not be given.

S. 640 would supersede any state law regarding matters covered by the bill. All of those matters - tort law issues regarding recovery for harm - historically have been reserved to the states.

It is ironic and misleading that the justification for Federal involvement is what the bill terms the Federal government's "comprehensive system for regulating general aviation." It is ironic because many of the proponents of this legislation are the very folks who have traditionally (and in many cases successfully) opposed tough, comprehensive regulation by the Federal Aviation Administration. These same people are now seeking to hide behind that limited regulation as justification for passing a statute to avoid liability for injuries caused by defective aircraft. It is misleading because while proponents of this bill cite that FAA's responsibility for establishing aircraft design, construction and certification standards and standards for maintenance, inspection and repair, they fail to cite what they know is also true: that the Federal Aviation Act of 1958, by its very terms, specifically requires that agency to set only minimum standards. Minimum standards do not necessarily establish an acceptable level of safety. Quite simply, the Federal regulatory structure as it relates to the general aviation industry does not justify enacting a relaxes liability standard.

To compound the matter, as the U.S. Supreme Court recently noted, "the FAA by regulation has authorized the applicant itself to conduct the inspections and tests necessary to determine that an aircraft comports with FAA airworthiness requirements . . . With fewer than 400 engineers, the FAA obviously cannot complete (the) elaborate compliance review process alone. Accordingly, 49 U.S.C. Sec. 1355 authorizes the Secretary to delegate certain inspection and certifications responsibilities to properly qualified private persons. By regulation, the Secretary has provided for the appointment of private individuals to serve as designated engineering representatives to assist the FAA inspection process. 14 CFR Sec. 183.29 (1984). These representatives are typically employees of aircraft manufacturers who possess detailed knowledge of an aircraft's design based upon their day-to-day involvement in its development." (U.S. v. S.A Empressa De Viacao Aerea Rio Grandense Varig. 104 S. Ct. 23755, 2761 (1984) (See also 14 CFR Secs. 21.33, 21.35 (1983).

This involves a significant degree of self regulation by the industry. It hardly provides a fair and rational basis for preempting existing state tort standards in favor of a reduced federal liability standard governing actions against manufacturers of general aviation aircraft. The certification of general aviation aircraft involves the FAA and the manufacturer. No consumer has a role in the process. The FAA, understaffed as it is, cannot hope to conduct its own tests of new aircraft types. As a result, aircraft are certified when the results of tests performed by the manufacturer are submitted either directly to the FAA or to a designee of the agency.

The regulatory standards which the aircraft must meet are minimums. They are often antiquated. In some instances, the standards are based on technology dating back to the 1940's. There is no governmental incentive for manufacturers to surpass them. There are few marketplace forces for manufacturers to surpass them. The primary incentive to build safe airplanes which meet today's technology is coming from the civil liability system.

Let me share some examples.

"In 1929, Lieutenant J.H. Doolittle stated, 'a feature to which insufficient attention is given is designing and constructing an airplane so that it crashes well. This sounds odd, but many lives have been saved because the cockpit was strong and there was sufficient material between the pilot and the ground to absorb the shock of crashing.'" Saczalske, Aircraft Crashworthiness, University of West Virginia, 1965. The FAA recently made major changes in its crashworthiness rules. John Clark, a senior performance engineer for the National Transportation Safety Board called the old rule for crashworthiness "a joke".

Up until 1978, the FAA did not require shoulder harnesses for general aviation aircraft. They were optional, even though the safety aspects of shoulder harnesses were well known. I represented one individual who lost an eye in a crash of a Beechcraft Queen Air in 1978. He would have been unharmed had the aircraft been equipped with shoulder harnesses.

Before you think that the crash was severe, I should tell you that the plane was repaired and went back to flying.

Unfortunately, under the legislation that is before the Committee, the incentive to improve crashworthiness will be blunted. As indicated above, the bill would require juries to evaluate aircraft according to standards that often are decades old because many aircraft left the manufacture's hands that long ago. Moreover, the change in the liability standard from foreseeable use under current law to "intended purpose" under Section 5(b)(1)(A) will allow manufactures to state that even though they knew aircraft would crash, they did not "intend" that they crash. Generations of pilots and passengers will be condemned to 1940's technology beyond the year 2000.

The system of certification, which allows the manufacturer virtually complete control over the testing and certification of airplanes, is flawed beyond the inadequacy of the safety standards in the regulations. A Cessna 411, a twin engine airplane, crashed just after takeoff in Richfield, Minnesota, after an engine failed. As part of the litigation, Cessna hired a test pilot to fly an identical aircraft to show that even with an engine failure, the airplane could be returned safely to the airport. This was intended to prove that the aircraft was properly certified by Cessna.

When the Cessna pilot intentionally failed one engine, he lost control and crashed. He survived; the passengers in the original crash did not.

Testing done by Cessna and the plaintiff's expert indicated that 270 pounds of pressure was necessary on the rudder pedal to keep the airplane under control after loss of one engine. The FAA regulations call for a force of just 150 pounds of pressure. For some reason, in the certification process, the fact that the Cessna 411 did not meet the regulations "slipped by," thereby permitting an aircraft to be built that did not meet the minimum regulation for single engine safety.

When the Aviation Consumer Magazine examined the safety record of the Cessna 411, they found it was so bad that the aircraft should be grounded. Aviation Consumer, December 1, 1985, p. 30. Under the bill now before you, Cessna would face no liability for these aircraft, even though they do not meet the regulations under which they are certified. The aircraft are now approaching twenty years of age, a complete defense under S. 640 at p. 6.

The Piper Cheyenne, a popular turboprop, provides another example of why FAA regulation cannot serve as the premise for shielding manufacturers from liability. When tested by the British Civil Aviation Authority, the airplane was found to be so unstable in pitch that the test pilot said it was "so extreme that we just did not believe it could possibly be true." Aviation Consumer, Feb. 15, 1986, p. 7. The FAA has no regulations governing dynamic pitch instability, so the aircraft is certified here. The British CAA refused to certify the aircraft.

ATLA believes that S. 640 would unfairly and without just cause tilt the balance even in meritorious product liability lawsuits in favor of defendants. The bill would make it more difficult for injured victims to prove their case.

S. 640 would inject negligence into strict liability doctrine by subjecting the product to a "state of the art" test as defined by what was reasonably feasible in light of existing technology. Even when a plaintiff could show that an airplane was unreasonably dangerous and defective, that plaintiff would also be required to demonstrate that a reasonable manufacturer would have built or designed the plane differently. This would essentially mean that manufacturers would have a reduced legal obligation to pursue safety innovations and could content themselves with the status quo. Additionally, the bill would allow the manufacturer to avoid liability where the plaintiff used the aircraft in a manner slightly different than intended by the manufacturer, even though such use was foreseeable and the manufacturer could have reasonably produced a product that would have made such use less dangerous.

As I indicated earlier, the "intended purpose" language in Section 5(b)(1)(A) and the notion in 5(b)(1)(c) that in order to establish liability the plaintiff must prove the aircraft "was being used at the time of the accident for a purpose and in a manner for which it was designed and manufactured" raises very serious concerns. Among them are concerns regarding crashworthiness. Manufacturers may escape liability - even though they know that aircraft crash - simply because they do not intend that they crash. If a defective condition in the manufacture or design of an aircraft makes it less crashworthy, why should not that defect establish liability? It is wholly foreseeable that a general aviation aircraft may crash, notwithstanding that it is not intended or designed for that purpose.

While the liability standards in section 5 of the bill are matters of great concern, so too are the restrictions imposed under section 7. No civil action for harm arising out of a general aviation accident may be brought if the accident involves an aircraft which is more than twenty years old. No matter how compelling an injured victim's case might be, no matter that general aviation aircraft are designed to have (and are marketed as having) a very long useful life, no matter that there are many, many planes more than twenty years old that are still in operation, a manufacturer need only manufacture a plane - even a defective plane - that will fly safely for twenty years and that manufacturer avoids liability entirely under the bill.

The most glaring example of what would happen under the proposed legislation is shown by the dismal record of the Beechcraft Bonanza. The V-tail design originated on the Bonanza in 1947, and the aircraft received FAA certification in the 1940's. In 1956, the strength of the design was questioned by the FAA. Yet, thousands of the V-tails were produced, and more than 200 have come apart in the air. This compares with the handful of Bonanzas with conventional tails that have come apart in the air. S. 640 would exempt Beech from liability for all Bonanzas over 20 years old. I believe that it was the pressure of potential liability that caused Beech to be the first general aviation manufacturer to pay for a recall and correction of the defective part on an entire fleet of aircraft.

The comparative responsibility provisions of the bill (section 6) also are worrisome. The right of an innocent victim to full and fair compensation outweighs the policy desire to fix a defendant's financial exposure at precisely the percentage of damages for which that defendant is proved responsible. In the first place, the trier of fact rarely can fix with any reliability an exact percentage of responsibility. But more importantly, the common law rule of joint and several liability is long held and widely accepted. S. 640 would overturn that rule, and in cases involving insolvent or underinsured or otherwise unreachable defendants, would have the effect of imposing the financial burden of a general aviation accident not on the manufacture or supplier or maintenance person or pilot who caused the accident, as the case may be, but on the innocent victim. Under the common law rule, while lability may be joint among tortfeasors there must be individual responsibility in order to permit recovery. That is, under the widely accepted rule of state law, the defendant's conduct by itself must have been sufficient to cause the accident or have been an essential factor in causing the injury. That is not an unfair standard. It is hardly as unfair as forcing the innocent victim to bear the cost of the injury.

I have seen many reasons given for the cost of product liability insurance and the lack of sales of new airplanes. The letters I have written to the industry seeking the actual data on insurance costs have never been answered.

We do know that E.F. Krause, an engineer for Cessna Aircraft Company, analyzed the reasons for the lack of sales in general aviation. He presented his paper, "Technical Thresholds for Revitalizing General Aviation" to an industry conference of the American Institute of Aeronautics and Astronautics on September 14-16, 1987. His 11 page, well-documented paper has one sentence with a passing reference to products liability. His conclusions indicate that the lack of sales come from:

- high cost of ownership

- high cost of operation
- reduced market size
- financial environment
- aviation environment
- competition for air travel
- changing tastes and preferences
- need for product improvements

We also know that new aircraft sales were up in 1988, with the industry selling 1,143 aircraft with an average cost of $1,662,292.00. This represented a 40% increase in billings. (Washington Post, January 19, 1989).

The industry is rebounding without any change in products liability laws.

We also know that high production in the 1970's resulted in a flood of newer aircraft in the used market. Sales were falling well before the current "crises" developed. And as we know from many sources, the problems created for many industries by increasing insurance premiums are not related to the tort system, but have their roots in many other causes.

Conclusion

Before revising the aviation tort system, attention should be focused on the standards for safety as promulgated and enforced by the FAA. The aviation industry, in combination with many safety groups and insurance companies, has reduced the number of crashes substantially. Unfortunately, there are still aircraft in use which are unsafe and whose defects should be remedied. Standards for safety must be updated to provide passengers and pilots with aircraft that meet the current standards of technology. A quick "fix" to the tort system will not spare lives; it will only spread suffering to those least able to afford it. The real solution is to prevent the injuries in the first place.

THE ASSOCIATION OF
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ALAN A. PARKER
DEPUTY EXECUTIVE DIRECTOR
FOR PUBLIC AFFAIRS

October 4, 1989

Honorable Ernest F. Hollings,
Chairman, Senate Commerce,
Science and Transportation
227 Senate Hart Office Bldg.
Washington, DC 20510

Dear Mr. Chairman:

I am pleased to attach the responses of the Association of Trial Lawyers of America to the additional questions submitted by the Committee following its hearing on S. 640, the General Aviation Accident Liability Standards Act. We hope the responses together with the supplementary attachments also provided are helpful to you and to the Committee.

Please let me know if we can be of further assistance.

Sincerely yours,

Alan A. Parker

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Attachments [1]

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[1] The supplementary attachments were not reproducible.

Association of Trial Lawyers of America Answers to Questions from Senator Hollings

Q1. Is there currently a majority rule in state law regarding manufacturers' liability? If so, please state the majority rule, and further state the ways, if any, in which that rule would be altered by S. 640.

A1. Section 5 would alter dramatically the majority rule adopted by 46 of the 50 states regarding the liability of manufacturers. That majority rule is strict liability, a difficult standard for injured persons to meet because it requires a plaintiff to prove that a product was "defective" and "unreasonably dangerous" and the "proximate cause" of the injury.

S. 640 would make it vastly more difficult for injured victims to prove their case and to receive compensation. Proving that an aircraft was defective and unreasonably dangerous and proving that the defect caused the injury would not be sufficient. A plaintiff also would have to overcome the test imposed by Section 5 of the bill to prove that, at the time an aircraft was built, a manufacturer would have built or designed the plane differently based on then-existing reasonably feasible engineering and manufacturing practices. This test would unfairly, often impossibly, require an injured victim to prove what the manufacturer knew and when it knew it. Section 5 in effect strikes down the law of 46 states, imposes a negligence standard where none currently exists and tilts the balance, even in meritorious product liability lawsuits, in favor of defendants. In addition, Section 5 requires the injured victim to prove that the aircraft was being used in the manner intended by the manufacturer. This requirement goes well beyond the law in virtually every state that a manufacturer may be liable when a product is being used in a forseeable manner. Section 5 would enable aircraft manufacturers to escape liability merely by asserting that the operator deviated in some small fashion from the intended use of the plane even if the actual use was common and forseeable.

Q2. How does state law currently treat evidence on "state of the art"? Would S. 640 change the law in the majority of states? If so, please describe how it would do so.

A2. The "state-of-the-art" issue relates directly to the majority rule regarding manufacturer liability discussed in the answer to question one above. A state-of-the-art requirement such as that imposed in Section 5 of the bill undermines the strict liability standard adopted in 46 states.

Only 10 states have adopted the approach in S. 640 that a state-of-the-art standard would bar liability. Of the 37 states that have explicitly addressed the issue of state-of-the-art judicially or legislatively, 25 have rejected the approach taken by the bill. A handful of states, among them Hawaii, Missouri, Mississippi and Pennsylvania, prohibit altogether even the admission into evidence of state of the art. Another 23 states, permit the introduction of state-of-the-art evidence, but hold firmly to a rule that such evidence must be just one factor to be considered by a jury in assessing the condition of the product.

It is not a bar to liability as it would be under this bill. Two states create a rebuttable presumption that a product is not defective and unreasonably dangerous if it complies with the state of the art.

Two additional points need to be made about the state-of-the-art defense proposed by Section 5. Perhaps most important, it would act to freeze safety development in the manufacture of general aviation aircraft by removing any liability incentive for manufacturers to move beyond what is "reasonably feasible" given present technology. The effect of the bill would be to destroy the very policy which has always driven strict liability--to encourage the manufacture and marketing of safe products. Secondly, the state-of-the-art provision would compound further the difficulties already faced by the injured victim seeking compensation for a disaster caused by a defective aircraft. A victim can prove that an aircraft was defective, can prove it was unreasonably dangerous, can prove that the defect was the cause of the disaster and still, a manufacturer can escape liability by winning an expensive and time-consuming battle of experts regarding what engineering practices were "reasonably feasible." Indeed, S.640 would impose the most stringent form of a state-of-the-art requirement because the burden is placed on the victim to prove that the aircraft did not conform to the "state of the art." Of the 10 states with a state-of-the-art standard, seven require the manufacturer to prove compliance with the standard.

Q3. How do the states currently treat joint and several liability? Please state the majority rule if there is one. If not, please indicate the number of states that follow each version of state law. Please state how S. 640 would affect current state law on joint and several liability.

A3. Sixteen states plus the District of Columbia retain the doctrine of joint and several liability in its original formulation, which holds that all defendants are both jointly and severally liable to the plaintiff for any and all damages assessed. That doctrine would be abolished in many cases (and severely modified in limited others) by Section 6(b) and (c) of S.640.

Attached to this response is a list of the sixteen states that retain the original doctrine and a brief description of how each of the other 34 states have modified it. Only several of the 34 have gone as far as S.640 would go in abolishing the doctrine.

Q4. How many states currently apply the principle of comparative responsibility? Please state how S. 640 would affect current state law in this area.

A4. Fourteen states currently apply the principle of comparative responsibility proposed by the bill. Six states retain the old, mostly discarded principle of contributory negligence while the remaining thirty states have adopted a form of comparative negligence which (except in two cases) bars recovery if the plaintiff is 50 or 51% responsible. Few states in any category require the trier of fact to determine the percentage of responsibility of persons not a party to the action. Such a provision is contained in Section 6(a) of S.640. Attached to this response is a state by state description of the law in each state.

Q5. Please indicate the number of states that currently have a statute of repose in effect, and the length of the statute of repose in each state.

A5. Once again, S.640 would overturn majority law. Twenty-four states enacted a statute of repose within the past decade. Two of those states recently repealed their respective statutes. In five other states, state courts have held a statute of repose to be unconstitutional. Consequently, only 17 states have valid statutes of repose. Attached is a state-by-state description of the statutes of repose.

Q6. Please list all types of aircraft that you believe would be covered by S. 640 as currently drafted. Please provide any information available to you about the number of each such aircraft currently in use, and the safety record of such aircraft.

A6. We are still developing as much of this information as possible and will provide it as soon as it is developed.

Q7. Please state whether you believe S. 640 could be read to conflict with or preempt the Federal Tort Claims Act in cases involving the government.

A7. It has been stated clearly by those who drafted S.640 that it was not their intent to conflict with or to preempt or to modify the Federal Tort Claims Act. Still, the Justice Department has expressed serious concerns in this regard and in response to those concerns has reportedly drafted substitute language. We believe the Committee needs to more closely examine this issue as would we before offering a definitive opinion.

Q8. Please describe current state law with respect to punitive damages, and include in your answer the number of states that have adopted each rule. Please state how S. 640 would affect current state law on punitive damages.

A8. Section 10(a) of S.640 is inconsistent with the standard of proof required for an award of punitive damages in a majority of jurisdictions. In the majority of jurisdictions, a preponderance of the evidence is sufficient to support a claim for punitive damages. Twenty states follow other rules: fifteen jurisdictions require clear and convincing evidence; one state requires proof beyond a reasonable doubt; five states generally do not allow punitive damages. Attached is a list of the states following minority rules on the burden of proof for punitive damages in product liability cases.

Q9. Please provide your view on the joint federal-state jurisdiction established by S. 640 and whether it would provide uniformity of law.

A9. Section 13 of the bill wholly belies the myth perpetuated by the proponents of S.640 that their purpose in seeking congressional relief is somehow to provide "uniformity" in the law pertaining to liability for general aviation accidents. Preempting the law of the fifty states without at the same time vesting original jurisdiction solely in the federal courts is highly unusual. Moreover, it would ensure non-uniformity, involve in the process an entire second level of courts and generally promote a chaos in the existing system that does not now exist. Each of the fifty state court systems would be fully empowered, indeed required, to litigate and interpret separately according to their own judgment and experience, these brand new, untested, never before considered federal standards. How is that a prescription for uniformity? Instead of, for example, relying upon the decades of experience that have led to the manufacturer liability standard now applied by 46 states, all of those states, plus more, would be called upon to begin anew, interpreting untested standards and provisions. Beyond that, an entirely new level of courts, a separate judiciary -- the federal system -- simultaneously, also would be independently interepreting and separately applying the new standards. In short, S.640 would not provide uniformity.

Senator **Ford**. Your statement reminds me a little bit of an electric meat slicer like you see at grocery stores, that had been used for 33 years at a military installation. It was sold at auction for practically nothing. The fellow who bought it cut off two fingers and sued the manufacturer and won.

Something about that we would say ain't right, you know, maybe. But there is a 33 year old meat slicer that has been going forever, you know, in the military, and then sell it at auction, and then he sues the manufacturer after 34 years out in the public.

Mr. **Wagner**. He could not recover in Florida. He could not win.

Senator **Ford**. Well, but that is what we are getting into, if you can recover in Kentucky and you cannot recover in Florida, but you can recover in Florida and you cannot in Kentucky.

There is nothing uniform about this, and we have got 50 different—and I am for states' rights. I have a very, very hard time not allowing states to do certain things. One of the few times I ever got involved in that was on standards for appliances or appliance standards, so that in Bristol, Tennessee, in a Sears Roebuck store you would not have three stoves, three refrigerators, three of everything, because you had three states right there at Bristol, or Tri-Cities, which you have landed in probably, a nice new airport.

But I am just saying that I invaded that premise one time and I try to stay away from it, but it seems to me that we are getting into a state by state and how strong you are in the legislature or how weak you might be depends on the laws that are promulgated by the legislature and signed by the governor.

Let me ask you, Mr. Wagner. You have heard the testimony of the general aviation manufacturers that their liability costs have skyrocketed while their accident rates have decreased over the years. Do you dispute that figure?

Mr. **Wagner**. I do not know what their insurance costs are, sir.

Senator **Ford**. Well, you know they are going up if yours are going up, probably, in all facets of your daily life.

Mr. **Wagner**. Yes, sir, but I do not know what the reasons are. The recent report of the insurance commissioner in the State of Wisconsin—St. Paul—Minnesota, excuse me, sir—reflected on a separate item, but when we were finally able to get the facts we found that medical malpractice insurance premiums had gone up some 400 percent in a situation in which the insurance commissioner, after digging and digging for the facts, found that the costs had not gone up, the number of claims had not gone up, the severity of the claims when adjusted for inflation had not gone up, and the number of cases which the insurance companies themselves defined as frivolous had not gone up.

So the fact that the insurance premiums have gone up may be accurate, and I assume they have, but that doesn't prove anything about liability.

Senator **Ford**. We are back to insurance-bashing again, and that usually happens in most of these hearings. You would not be able to collect most of your claims if it was not that for the fact that the clients or the defendant are insured. You would take a very serious, hard look at filing suit against somebody that had no insurance.

Mr. **WAGNER**. Well, in all fairness, sir, from what I have heard today, when I sue the aviation manufacturers they do not have insurance.

This bill will in effect shift the cost of some of those losses to those people who do have insurance. The guy who fixes my airplane, the guy who puts oil in it, the guy who repairs it, their insurance costs are going to go up and then they are going to be screaming: Why did our rates go up? It is because we are being stuck with lawsuits that the manufacturer should be responsible for.

Senator **FORD**. You ought to talk to them a little bit and get them to reduce their gasoline, what we get from the refinery, and say, your gasoline is going up, and I have got to fly—I am going through this state because the gasoline is a nickel cheaper, you know.

But you will not dispute the fact that the accident rate is going down?

Mr. **WAGNER**. I believe the record put in evidence indicates that the rate at this time is going down. Now, that happens to be the rate per aircraft and per hours flown. That does not necessarily mean the rate for any particular type of aircraft.

Senator **FORD**. Well, but generally, generically you are talking about that the accident rate per hour per unit is declining?

Mr. **WAGNER**. I think per hour, yes, sir.

Senator **FORD**. All right.

Your organization takes the position that this legislation is anticonsumer. Now, that is the statement. I am sure you have read it.

Mr. **WAGNER**. Yes, sir.

Senator **FORD**. I would like to know specifically which provisions you believe of the legislation—let us not get into some of these hypotheticals—that would alter the majority of state laws, in a way that would injure the consumer?

Mr. **WAGNER**. Well, I think the application of the negligence standard in strict liability will definitely make it more difficult, more expensive, and very difficult for many consumers to recover, sir. I do not have a case by case situation comparing your standard to the standards of the various states.

But I can assure you that in the great majority, I think the overwhelming majority, this will limit the ability of a consumer to be compensated when an aircraft manufacturer's unit fails or is defective.

Senator **FORD**. Well, you have raised specific objections about the section of this bill referred to as the statute of repose.

Mr. **WAGNER**. Yes, sir.

Senator **FORD**. That prohibits recovery in accidents involving aircraft over 20 years old. Would not this provision actually improve the situation for consumers in some states that now have a statute of repose that is shorter than 20 years?

Mr. **WAGNER**. Very few states have such a statute, sir.

Senator **FORD**. But still?

Mr. **WAGNER**. Yes, in those few, it would improve. But it would dramatically reduce the rights of those in the majority of states, in which the legislature, after careful consideration during this very extensive recent so-called insurance crisis considered, they all considered, do we want a statute of repose, do we want to limit damages, do we want to do a lot of things? They applied states' rights.

The great majority of them said no, we do not want a statute of repose. Now, some did and they are testing it. Incidentally, Florida tested with a statute of repose and has repealed significant portions of the statute of repose because they found it was unfair. They tested states' rights.

They tried it at twelve years. They have repealed it.

Senator FORD. Having been a governor, I understand legislatures and I understand lobbying very well.

Mr. WAGNER. Yes, sir. But we have a Republican governor and that was approved by a Republican governor.

Senator FORD. But that does not make any difference. I am just talking about governors and legislatures and lobbying. I was not trying to say a party at all.

Mr. WAGNER. I am sorry, sir.

Senator FORD. This is my friend.

Mr. WAGNER. I understand.

Senator FORD. He is my friend. I do not look at him as a Republican, you know.

Mr. WAGNER. I understand. I apologize.

Senator FORD. So let us be careful about your politics now.

Mr. WAGNER. I apologize. I should not have referenced that. In Florida we usually test whether or not something is a liberal or conservative measure, whether it is for consumers or against consumers, in terms of who happens to be governor.

That is manifestly unfair and I will agree with you, sir.

Senator FORD. All right. Let that be a matter of record.

The Department of Transportation has commented favorably on this bill and Senator Kassebaum submitted Secretary Skinner's letter of support, which means this Administration lends its support to this piece of legislation. And that suggests that the current liability situation puts the United States general aviation manufacturers at a competitive disadvantage.

Secretary Skinner stated that U.S. manufacturers face a huge liability exposure: "created by the very large number of long lived American built aircraft in the world's active operating inventory. Foreign manufacturers face no exposure and enjoy much more favorable and less costly liability regimes in their own countries."

Would you comment on this argument, Mr. Wagner?

Mr. WAGNER. Well, sir, I have not seen and analyzed his statement, so I really cannot comment, except that I would say I would just disagree with the conclusion as stated by you, sir, as stated by the Secretary of Transportation.

Senator FORD. I am just quoting the Secretary of Transportation, who was obviously representing this Administration.

Mr. WAGNER. Yes, sir. But the fact that somebody represents the Administration does not necessarily mean that it involves a careful analysis of all the issues and the arguments.

Senator FORD. But wait a minute. They are on the line and they are the ones that you are going to see on television, and not me. This is an Administration that you probably referred to earlier that would be more conservative.

Now we find a so-called "conservative" Administration supporting this.

Mr. **Wagner**. They have supported this legislation and others like this, including the general products liability bill, for eight years. As I say, though, those who carefully consider all these issues feel that they may be wrong in this particular case. Their opinion is subject to question.

Senator **Ford**. As I understand it, this bill establishes a strict liability standard consistent with that in the Restatement of Torts. And I am not a lawyer, so therefore I have some difficulty keeping up with you fellows.

Daddy always told me: A little knowledge of the law is dangerous; get you a good lawyer and stay with him. And I have tried to do that.

Is this standard I have referred to consistent with current law in the majority of states? If not, how is it different?

Mr. **Wagner**. Well, sir, it does not comply with the strict liability announced in the Restatement of Torts. I happen to be an elected member of the American Law Institute, which produces that, and there are those who have proposed amending the present Restatement of Torts so that it would be more in line with what you say. So far, that has not received very much support within the American Law Institute at all.

Senator **Ford**. But there is a proposal that they do that, is that correct?

Mr. **Wagner**. There is always proposals from some sources to change any kind of law. As a governor, I am sure you are well aware—or a former governor and a Senator, you would recognize that there are always proposals to change.

However, this is not——

Senator **Ford**. Sometimes change is right.

Mr. **Wagner**. Sometimes it is, yes, sir. Sometimes change for change's sake is wrong and sometimes change for protectionist reasons is wrong, too. Perhaps sometimes it is right.

But the Restatement does not include the provision "according to engineering and manufacturing practices which were reasonably feasible at the time," and that changes the Restatement significantly, which is the prevailing law in most states, by putting it into a negligence context.

Senator **Ford**. When you say "most," what do you mean? You said that a while ago, "most states."

Mr. **Wagner**. I wish I could have a figure of those——

Senator **Ford**. "Most states," that means——

Mr. **Cohen**. 46 states.

Mr. **Wagner**. 46 states, that is, "most" of them have the Restatement.

That is Mr. Dan Cohen, for the record, who keeps track of these numbers for people like me that did not have time to do it last night, sir. I am sorry.

Senator **Ford**. Well, that is perfectly all right, as long as we get the answer.

Mr. **Wagner**. The Restatement law is adopted in most states, and I think 46 is correct. That is it.

Senator **Ford**. All right. Senator McCain.

Senator McCAIN. Thank you, Mr. Chairman.

Mr. Wagner, you obviously do an excellent job, as certainly would be anticipated, given your line of work, and I think you make some very important points. Let me just go over a few of them with you if I could.

You and the Association have labeled this legislation anti-consumer. Yet every consumer group, every consumer group—the Airline Operators and Pilots Association—every single consumer group, my friend, supports this legislation. And the only group that significantly opposes it is the American Trial Lawyers Association.

Perhaps you could reconcile that to me.

Mr. WAGNER. Yes, sir.

Senator McCAIN. Since this legislation is "anti-consumer."

Mr. WAGNER. Consumer Federation of America specifically opposes this bill. The Consumers Union specifically opposes this bill. Public Citizen specifically opposes this bill. The United States——

Senator McCAIN. You are giving me consumer groups that are not related to aviation, Mr. Wagner. I am talking about every consumer that is directly related to aviation.

Mr. WAGNER. No, sir. These people represent the very people who are most involved in aviation, the passengers.

Senator McCAIN. No, they do not. The Airline Owners and Pilots Association represent the consumers, and the General Aviation Manufacturers Association I think to some degree represents them, since they are their customers. The insurance companies represent them.

They are the organizations that are directly involved with aviation. Why is it that all those, particularly the Aircraft Owners and Pilots Association, who are the users of the aircraft—how do you explain just that group?

Mr. WAGNER. Well, just the AOPA? I would like to offer, if I can quickly find it, a letter from the President of the AOPA, in which he indicates that liability is not the problem with aviation, that this is not the thing. Now, you say they support it.

Senator McCAIN. Well, why does his organization support this legislation?

Mr. WAGNER. Well, I have some interesting correspondence back on that subject, and basically what they say is, we will just do anything to help the manufacturers start manufacturing airplanes.

They have been led astray.

Senator McCAIN. So the answer is they have been led astray because they are either stupid or ignorant?

Mr. WAGNER. Well, sir, if you read this letter, which I hope we would have an opportunity to offer for the record——

Senator McCAIN. I have not only read letters, Mr. Wagner; I have talked with these people time after time. I have talked to the guy that operates the little airport in Sedona, Arizona. I have talked to the guy that runs a flying service in Kingman, Arizona. I have talked to the people that are the hands-on people, not the Trial Lawyers at some Trial Lawyers meeting.

But I have talked to the people, sir, that are directly involved with aviation, and they recognize that unless we get something done their job, their business, their livelihood is going to come to an end, and that they have already been dramatically affected by it.

Mr. WAGNER. Senator McCain, of course I cannot speak to——

Senator McCAIN. So I will be glad to read any of your letters. But the organization itself of aircraft owners and pilots are opposed—are in support of this legislation, yes or no?

Mr. WAGNER. Yes, sir. I am a member of that organization and I would like to show you what the President says.

Senator McCAIN. I think it is interesting what the President says, but what the organization stands for is far more important to me.

Mr. WAGNER. Well then, I would respond by saying that the Aircraft Owners and Pilots Association is made up of a cross-section of pilots, and I do not know what the local person in Kingman, Arizona, was told when he——

Senator McCAIN. I'm talking about the organization, sir.

Mr. WAGNER. Yes, sir. I will agree with you that they are apparently in support of this bill.

Senator McCAIN. Apparently?

Mr. WAGNER. I have not seen their testimony yet this time, sir. I just have not seen it, I am sorry.

Senator McCAIN. Okay.

Mr. WAGNER. I did last year, yes, sir. At that time they were.

Senator McCAIN. Thank you.

You know, I also am interested in this statement, which is a very strong one and, as I say, as I would anticipate, a very coherent argument, and it brings up some specific objections to the legislation which I think deserve consideration.

Why is it, sir, that your organization consistently over three Congresses now has failed to try to sit down with Senator Kassebaum, with Congressman Glickman, with our staff people and try and work out some of these problems? Why is it that you have not done that?

Mr. WAGNER. I represent lawyers, and by that position I have the capability of bringing to your attention those things which we feel are unfair and unjust in legislation.

I would never be able to settle a case without talking to my clients, the injured persons, and getting their approval. I cannot talk to those people who are going to be injured and hurt in the future and get their approval to give away their rights.

Therefore, sir, I just do not feel that the Association should be in a position of saying, we are going to give away the rights of our future clients.

Senator McCAIN. Any discussion of these points and objections that you have would be "giving away the rights" of your clients, Mr. Wagner?

Mr. WAGNER. No, sir. We are here discussing the points and pointing out the points that we feel are bad. We frankly do not feel—two things: We think most of them cannot be corrected; but those that can be corrected we think are adequately being corrected by state legislatures.

Senator McCAIN. But what you are saying is, you will not sit down and talk with our staff or our people about this legislation, or you have not in the past. So the reason why you will not is because anything you say or do will give away the rights of your clients, is that correct?

Mr. WAGNER. No, sir. I believe really our staff has sat down and discussed with your staff our problems and concerns.

Senator McCAIN. They have not, they have not.

Mr. WAGNER. But when it gets to the point where we're asked, would you agree on an X year statute of limitations, we do not have that authority. We are not elected to do that, sir. We are not elected by anyone.

We can only tell you what we think are the bad points of the legislation. And I would be more than personally happy to sit down with any staff member and discuss these things in great detail. But when it gets to the point where, ever to make you happy, I cannot give away my clients, my future clients' rights I do not even yet represent.

Senator McCAIN. Well, Mr. Wagner, in the testimony you, as opposed to most every other organization I have dealt with who also have an obligation to their clients, have refused to sit down and go over these various points of differences, where other organizations that I think have equal and sometimes more responsibility than you do have been willing to do, at least so we can try to arrive at some agreement. I suggest that you would reconsider your position.

You have referred in your testimony to minimum standards of the FAA.

Mr. WAGNER. Yes, sir.

Senator McCAIN. Can you cite a couple of examples of standards that you believe are too lax and should be improved?

Mr. WAGNER. Well, the 411 is a good example.

Senator McCAIN. What is that?

Mr. WAGNER. The one that is in our statement concerning the aircraft, the Cessna 411, that met the standards, but in fact was determined by a significant number of people, including Aviation Consumer as being a disaster.

Now, the use of those minimum standards resulted in an unsafe aircraft, and therefore that is one.

The minimum standard that approved the way in which this seatbelt was designed so that that could—that happens to be a minimum standard that was met. But I think, personally representing a client and knowing of two or three other people on that aircraft, that that happened to be a minimum standard that was not sufficient.

Senator McCAIN. Mr. Wagner, I was not even going to go into this. When an airline or a user is told to carry out a certain procedure and they do not carry out that procedure, then the problem lies with the person that does not carry out the procedure or the person that tells them to carry out the procedure?

Mr. WAGNER. Well, I would assume, sir, the person that told them to carry out the procedure that they did not follow. That has nothing to do with our safety belt situation.

Senator McCAIN. You mean the person that told them to carry out a procedure, for example to install a seatbelt correctly, and that procedure is not carried out correctly; then whose fault is it?

Mr. WAGNER. Well, sir, in the context of what I was discussing——

Senator McCain. I would like you to answer my question.

Mr. Wagner. If it is not installed correctly after proper instruction to someone who should know how to do it, certainly the person who installed it incorrectly is responsible. And that is what most juries find, and as far as I know that is what most laws find. That is what most courts find.

Senator McCain. The case of the aircraft that the guy took off without draining the tanks I think is an example that is not in keeping with your statement.

Mr. Wagner. No, sir, but let me give you an example of the draining of tanks that is in keeping with my statement, which is a Cessna aircraft, a Highwing Cessna aircraft, in which you could drain it and, because of the design, water would still be in the tanks, and only when the plane was banked could you determine that water would get into the engine and cause the engine to cease operating.

That was a defective aircraft, and only lawsuits brought that correction to the Cessna Highwing aircraft that caused that. Now, the pilot was instructed, drain the tanks of water. And he could do everything he could do. He would drain it and he would wait until he saw gasoline come out.

But when the gasoline kept coming out, he assumed, I suppose rightly, that it was sufficiently done. When he flew the aircraft, the engine stopped.

Now, it is a much more difficult point of view at that time to say who was really at fault. Did he not drain enough gasoline or did they design a feature that made it very dangerous for him?

Senator McCain. Well, that is a very interesting case. Of course, the other case was in May 1979 in Tampa, your home town. After takeoff he crashed because he neglected to drain any water from the quick drains.

The manufacturer was sued because the owners manual, on an airplane model which had been discontinued for nearly three decades and was not originally equipped with these drains, did not include instructions on their use. The manufacturer lost a million dollar suit.

Mr. Wagner. I would love to have the citation, because I keep track of cases like that. And if that case occurred in Tampa, in which those are the only facts, I want to go hire the lawyer, because—I would really like to have the citation.

Senator McCain. I am sure you can afford to.

You know, you said in your statement that what this legislation would do would be deprive people of their proper compensation. Again, that is almost incredible to me, because what that means is that a majority of this committee, at least including the chairman and others, are interested in depriving defendants of their rights. We are not, Mr. Wagner.

Mr. Wagner. Oh, certainly not, sir.

Senator McCain. And for you to reach that conclusion I think is very unfair. It either shows a lack of understanding of what we are trying to do or some other motive which I am not sure of.

Mr. Wagner. No, sir, I would not want you to think that, sir. We are here to try to give you information, as I am sure the manufacturers could give you information, and I trust you will make a sound decision on it.

Senator McCain. One of your statements, by the way, which I will go into, having been involved in the testing of aircraft, where you said that the pilot who tested at the minimum safety air speeds and he was the most qualified and in the best conditions, et cetera.

I am sure you are aware, Mr. Wagner, that after this is determined that there is a certain amount of cushion added in on this minimum air speeds to take into consideration exactly the conditions you talked about.

Mr. Wagner. Certainly.

Senator McCain. So every test that is performed on an aircraft, we find out what the minimum safe air speed is and then a reasonable cushion is added in. That is standard procedure on the testing of any aircraft. You failed to mention that in your statement, sir, and so therefore I think your statement is misleading.

Mr. Wagner. Well, sir, I do not really think it is, because the cushion that you referred to is a matter that is subject to the manufacturer to do.

Senator McCain. No, it is subject to approval of the FAA, as well as the manufacturer, of which there are significant experts who in fact are more expert than you are.

Mr. Wagner. This may be so, sir. But what ends up happening is, once the FAA determines the line, the manufacturer very frequently tries to get as close to that line as he can, for whatever reason.

Senator McCain. He tries to, but the FAA does indeed monitor very closely and carefully this, and carries out their own tests as well. But it is a very minor point.

I guess I have run out of time here. There are many other areas that I would like to explore, but I would like to say again that purporting to represent the consumer here when the consumers who are directly involved with general aviation are very much in support of this legislation—we would not have received the support that we have if that were not the case—I think is an important aspect of this issue.

I sincerely wish that your people would at least sit down with our people and with me and with the chairman and with Senator Kassebaum and Congressman Glickman and see if there is not something that we can work out, which now for the third Congress you have failed to do.

Thank you, Mr. Chairman.

Mr. Wagner. Thank you, sir.

Senator Ford. Let me say to you, Mr. Wagner, that you had Mr. Hogan represent you at our hearing in the last Congress, and I asked him if he was any kin to the golfer and he declined.

Mr. Wagner. No, sir, he is not, that is right.

Senator Ford. But at that time he made a statement—I believe Mr. Martin might remember that—about the only problem that you all had as trial lawyers was the statute of repose, and that he thought you could sit down maybe and work it out.

Mr. Martin who was also at the table at that time said that Mr. Hogan had a pretty good idea and he was willing on a personal basis, not for his client but on a personal basis, to sit down and try to work that out.

Well, we had both entities here at the table at that time and it appeared to me that we may have reached a point where we could sit down and talk, as my friend here has indicated. The call was made and we were denied that by the Trial Lawyers. They were not willing, after Mr. Hogan's testimony, to sit down with Mr. Martin and others to try to work out the statute of repose.

Now, if that was the only question and problem with the Trial Lawyers last time—and Mr. Hogan had just won a big lawsuit. Oh, it was a tremendous lawsuit and he was here to represent you all because of what he had done. And it took him a long time. The accident was in 1979. He took it to court I believe in 1983. It took him two years to get it out of court, which is 1985.

He talked about the one-third plus expenses that he received. He was right proud of it, one-third of $2 million, I think, or something like that. And he was very proud of the case and the amount of money he received as a young lawyer.

And I do not blame him. He won a pretty good one, when you look at $2 million and you get a third of that. And then the plaintiff gets that less one-third plus all the expenses. He estimated that the plaintiff may have gotten 50 percent.

But still I go back to the point that he said at that time that he had one problem or the Association had one problem, and Mr. Martin said that personally he would be willing to sit down and see if we could not work out something. It meant something he would have to go back and check.

Well, he was ready and the Trial Lawyers decided, un-uh, we do not want to talk. It gave me a little impression of what we refer to around here as stonewalling.

Do you think maybe you might go back and revisit the testimony in 1987 Mr. Hogan made and Mr. Martin agreed to, and you all might reconsider your position?

Mr. WAGNER. I of course know Mr. Hogan and he was here representing us at the time. As I understand, he, much as I did, at the very last minute was asked to come up and appear as a substitute witness.

Senator FORD. Well, he was called. You are President. You are representing. He was called because of his experience.

Mr. WAGNER. Mr. Hogan is no longer an officer in our organization, and I am not even sure he was an officer at that time.

But in any event, sir, as I have indicated to you, we are willing to talk, but the Association as a group—and by the way, we meet not only as a group with members, but with a broad spectrum of consumers' representatives, with our clients groups—we feel that this is a bill about which we want to give you all the information we can, point out all the defects; but that we are not empowered, and certainly Mr. Hogan is not and certainly I am not, either on behalf of the Association or on behalf of our future clients, empowered to give away their rights.

We feel that if we give you the best possible view and information on this and you come to the conclusion that, regardless of this information, that you feel some line must be drawn, I guess that is why you get paid to be a Senator and I am a lawyer, sir.

Senator **Ford**. Yes, but you make so daggone much more than I do, and it took you at least two minutes to tell me no.

Mr. **Wagner**. I am sorry, sir?

Senator **Ford**. That is all. All you had to do is say yes or no. I like those kind of answers. As a non-lawyer, I understand them better because I do not know how to play on words, and I am very sorry that I am not capable of doing that.

Mr. **Wagner**. If the question is would we be willing to talk, we are always willing to talk. If the question is are we willing to compromise, the answer is no, sir, we are not.

Senator **Ford**. So regardless of what we do here, you all are not willing to support—or you are going to be against any piece of legislation that would give somebody else a break?

Mr. **Wagner**. Let me respond to that, sir.

Senator **Ford**. In black lung—I come from Kentucky. In black lung it is presumed, there is a presumption, after 25 years.

Mr. **Wagner**. In the fisheries bill recently, we did insist that safety provisions be included, and after the safety provisions were included, the tort reformers backed away. We do not see any safety provisions in this bill. I would like to see somebody look at some strong safety provisions.

You wish to have a suggestion of what would help this bill? Some adequate safety provisions might help it. I am not going to say that that would be something that would make us sign off on the whole bill, if you gave good, adequate, strong safety provisions in this bill.

But at least if it is going to do, as the proponents say, a better job of compensating people for their losses, there ought to be some addressing of the whole safety issue.

Senator **Ford**. Can I ask you a question then, to get a yes or no answer?

Mr. **Wagner**. Yes, sir.

Senator **Ford**. If we put some safety language in here that meets a reasonable position that you might have, would that put you a little closer to support for this legislation?

Mr. **Wagner**. The provisions that are in there?

Senator **Ford**. No, no. I say if we put a safety provision that you just now elaborated on, would that put you a little closer to support of this bill?

Mr. **Wagner**. I cannot answer that yes or no, and you have told me if I do not I am bad. It would have to depend what the provision is, sir.

Senator **Ford**. Thank you, Mr. Wagner.

Mr. **Wagner**. Thank you.

Senator **Ford**. It is always a pleasure to have you fellows here. It makes life more interesting.

Mr. **Wagner**. Thank you, sir.

Senator **Ford**. This hearing is adjourned.

[Whereupon, at 11:15 a.m., the subcommittee was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF HON. BOB DOLE, U.S. SENATOR FROM KANSAS

Mr. Chairman, I am pleased to be a cosponsor of S. 640, the General Aviation Accident Liability Standards Act of 1989 which has been introduced by my friend and colleague from Kansas, Senator Nancy Kassebaum. I encourage my colleagues on the Subcommittee on Aviation to act favorably on this importannt and much needed legislation.

The general aviation industry is in the midst of a liability crisis. Liability insurance claims have skyrocketed to over $200 million annually—up from $24 million ten years ago. That translates into lost jobs and lost export opportunities. This increase makes no sense considering the greatly improved safety record of the general aviation industry.

Over 17,000 aircraft were sold in 1979. Only 1,143 were sold last year. A large part of this decline is a direct result of the current product liability environment. We are particularly affected in Kansas because Wichita is the home of the Beech, Cessna and Lear companies.

General aviation manufacturers are primarily self-insured, so this is not a commercial insurance problem. It is fast becoming impossible for general aviation manufacturers to secure insurance at any level. It should be made clear at the outset that this is not an aviation manufacturers' relief bill. This bill creates uniform Federal standards of liability that have not been developed in some arbitrary way.

This bill does not cap damages in any way. It does not cap or limit attorneys fees or waive the manufacturers' responsibility to supply warnings against potential dangers. In fact, those responsibilities would continue regardless of the age of the product. Further, the bill does not limit the right to sue.

This bill would retain strict liability and retains completely joint and several liability between the manufacturers of all subsystems and component parts. It would, however, enact comparative responsibility among other parties, as well as establish a 20 year statute of repose for aircraft and replacement parts, which would begin again each time a part is replaced.

Mr. Chairman, in my view, Federal aviation product liability standards are necessary to provide uniformity and predictability. I urge my colleagues to support this needed measure.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 15 1989

Honorable Wendell H. Ford
Chairman
Subcommittee on Aviation
Committee on Commerce,
Science and Transportation
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We have reviewed S. 640, the General Aviation Accident Liability Standards Act of 1989. Similar legislation has been proposed in both Houses on previous occasions, and its reintroduction in this form reflects the continuing and genuine product liability crisis which has crippled the general aviation industry in the United States. Although we would have preferred a comprehensive national approach to the product liability problem, we do not oppose this bill targeted at a specific industry, in light of the problems which general aviation has suffered.

However, we would like to point out certain provisions in this bill which reach beyond product liability actions, and therefore may preempt existing state law or affect cases involving the Government to an unnecessary degree. Primary among these is the extension of the bill to cover all tort actions arising out of general aviation accidents whether or not grounded in product liability, arguably (though not expressly) including actions against the United States [Sections 4(e)(2), 5(e)]. Although Section 4(b) states that the Act shall not be construed "to supersede or to waive or affect any defense of sovereign immunity asserted by the United States", this savings clause would not affect the potential conflict between this bill's venue provisions [Section 13(d)(1)] and those of the Federal Tort Claims Act [28 U.S.C. § 1402(b)]. The insertion of "or improper venue" after "sovereign immunity", in Section 4(b), would correct this disparity.

The bill's broad preemption of state law is necessary to address products liability but also would apply to negligence-based actions involving the United States. Some of the changes, such as the abolition of joint and several liability contained in Section 6(b), would ensure a more equitable liability regime for the United States, as well as for private defendants. Other provisions include the nationwide establishment of "pure" comparative negligence [Section 6(a)]. This results in a carefully balanced legislative scheme that would permit liability to be assessed in a manner that will not hinder innovation and growth in the general aviation industry.

It bears noting that other preemptive provisions are less favorable for non-governmental defendants than the tort reform provisions already adopted by some states. For example, the provisions for punitive damages are less restrictive than the actions taken by some states which have capped or otherwise restricted such damages (and certainly those states, such as New Hampshire, which have never provided for such damages); and the provision for joint and several liability among general aviation airframe and component/sub-assembly manufacturers, as well as for indemnity and contribution among them [Section 6(c) and (d)], reinstates such liability in states (such as Utah) which have completely abolished it. We believe that language from the Department's product liability legislation could provide an alternative:

> The provisions of this Act shall preempt and supersede any State law to the extent such law is inconsistent with the limitations contained in such provisions. The provisions of this Act shall not preempt or supersede any State law that provides defenses or places limitations on a person's liability in addition to those contained in this Act.

Finally, the extensive expansion of federal district court jurisdiction provided by Section 13 is certain to place an additional burden upon the federal system. We believe that most defendants would avail themselves of the removal provisions of the bill for cases commenced in state courts. Under the provisions of this bill, a minor landing accident, for example, causing only a few thousand dollars' damage to the aircraft, would provide a basis for federal jurisdiction. At the same time, defendants in an air carrier accident case would not be protected by this bill, and could not avail themselves of its jurisdictional provisions. Utilizing the size of an aircraft involved in an accident as the determining factor for federal jurisdiction is not particularly logical, in our view. Nonetheless, the effect could be ameliorated by inserting a jurisdictional minimum for the amount in controversy in cases covered by this bill.

While the foregoing matters are of concern to the Department, we recognize the importance of the vitality of the general aviation industry, both for the social and economic benefits which it provides to our citizens, and its historically important status as an export industry. We would be pleased to provide further technical assistance to the Committee in the areas we have pointed out, so that the general aviation industry and the nation could receive the benefits which passage of this bill would ensure.

The Office of Management and Budget has advised this Department that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

John P. Mackey

John P. Mackey
Deputy Assistant Attorney General

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

June 19, 1989

The Honorable Wendell H. Ford
Chairman, Subcommittee on Aviation
Committee on Commerce, Science,
  and Transportation
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The U.S. aviation industry is one of the bulwarks of our economy, and its manufacturing sector is the world's leader. This leadership position was forged in a climate of vigorous competition, both domestic and international. We have a vital stake in preserving and fostering that competitive climate and in ensuring that U.S. aircraft manufacturers not only enjoy a level playing field abroad but also shoulder no unnecessary competitive disadvantage at home.

General aviation's manufacturing industry does operate at such a disadvantage today. Because of its very success in the past, the U.S. general aviation manufacturers confront a huge liability exposure created by the very large number of long lived American built aircraft in the world's active operating inventory. Foreign manufacturers of general aviation aircraft face no such exposure and also enjoy much more favorable and less costly liability regimes in their own countries.

The U.S. general aviation manufacturing industry needs and deserves the modest relief offered by S. 640, the "General Aviation Accident Liability Standards Act of 1989". The bill would establish consistent, predictable federal standards nationwide for determining personal injury and property damage liability in general aviation accidents. The compelling justification for this legislation is a decade or more of mounting product liability claims against and losses by general aviation aircraft manufacturers. These product liability costs have risen to the point where they now constitute the largest single factor in the price of a new single engine airplane. If general aviation were unsafe or even tending in that direction, I could see some merit in this outcome. But the fact is that general aviation has never been safer than it is today. Moreover, the long-term trend in general aviation safety has been pronounced improvement for nearly half a century. In looking at the trends in general aviation product liability claims and settlements, I must conclude that the tort liability system, as it works today in the field of general aviation, is inequitable and unfair.

S. 640 would go a long way in correcting the imbalances and biases of the tort liability system as it operates in the general aviation field today. Accordingly, the Department supports the bill, deferring to the Department of Justice on technical aspects of the bill, and urges favorable action by the Committee.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report for the consideration of the Committee.

Sincerely,

Sam Skinner

Samuel K. Skinner

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

JUN 20 1989

Honorable Nancy Landon Kassebaum
United States Senate
Washington, D.C. 20510

Dear Senator Kassebaum:

I am aware that for several years you have been trying to rectify shortcomings in our tort system that have taken a costly toll on the general aviation industry. I am also aware that your efforts to gain enactment of legislation to assist the general aviation industry in this area have met with many frustrations in Congress.

While we would defer to the Department of Justice on technical aspects of S. 640, the "General Aviation Accident Liability Standards Act of 1989", the Department of Commerce believes that the bill is generally a very positive, well-justified response to the problems of the general aviation industry. We also feel that it complements the Administration's efforts to obtain comprehensive reform of our Nation's tort system.

The Department appreciates your efforts and pledges our support for S. 640 and other well-crafted tort reform proposals.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this report to the Congress from the standpoint of the President's program.

Sincerely,

Robert A. Mosbacher

U.S. Department of Transportation

General Counsel

[illegible] Seventh St. S.W.
Washington, D.C. [illegible]

JUN 12 1989

The Honorable Joseph R. Biden
Chairman, Committee on
the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Department of Transportation would like to provide its views on S. 640, the

> "General Aviation Accident Liability Standards Act of 1989."

The bill would establish a uniform federal standard for civil damage claims arising out of general aviation accidents and would preempt related state law. The uniform standard would require a showing that the liable party is negligent, that the negligence was the proximate cause of the accident, and in general a showing of --

- equipment which is unreasonably dangerous for its intended purpose according to reasonably feasible engineering and manufacturing practices at the time the product left the manufacturer's control, and was being used for a purpose and in a manner for which it was designed;

- failure to warn of dangers of which the manufacturer knew or should have known; or

- breach of express warranty.

A complete defense is available to the manufacturer for conditions that could have been corrected by compliance with FAA Airworthiness Directives or manufacturer service bulletins. Parties would be severally liable, in proportion to responsibility, except airframe manufacturers would be jointly liable for assemblies, components, and subcomponents installed (along with a right of indemnification and contribution).

A "statute of repose" would limit liability to the 20-year period following delivery, except for any longer express warranty, with the same rule applying to installation of a replacement part. Evidence that a manufacturer adopted subsequent remedial measures with regard to a particular design would not be admissible.

Punitive damages would be available only for "conscious and flagrant indifference" to the safety of persons. Suits would generally have to be filed within 2 years of an accident.

The bill would provide for concurrent federal and state court jurisdiction, with a right in the defendant to obtain removal to federal court.

This Department remains concerned about the tort liability crisis as it affects product liability for the manufacture of general aviation aircraft. Product liability insurance for the manufacturers is so expensive, and the deductibles are so high, that manufacturers are no longer able to protect themselves adequately from the effects of this exposure. Even where a manufacturer's alleged negligence is only a small factor in a general aviation accident, the lack of other financially responsible parties can make a manufacturer in effect the insurer of last resort under widely accepted principles of joint and several liability.

In our judgment, the bill takes a significant step towards correcting these and other inequities in the tort system, and we endorse quick action. Enclosed is a letter of support for the companion House bill from Secretary Skinner.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report for the consideration of the Committee.

Sincerely,

Rosalind A. Knapp
Deputy General Counsel

Enclosure

NATA
Founded
December 28, 1940

NATIONAL AIR TRANSPORTATION ASSOCIATION
4226 King Street • Alexandria, Virginia 22302 • (703) 845-9000
FAX (703) 845-8176

June 22, 1989

The Honorable Wendell H. Ford
Subcommittee on Aviation
Senate Committee on Science and Transportation
United States Senate
428 Hart Office Building
Washington, D.C. 20510

For The Record: June 21, 1989 Subcommittee on Aviation, Hearing on S. 640, General Aviation Accident Liability Standards Act of 1989.

Dear Senator Ford:

The National Air Transportation Association represents the interests of the nation's aviation service companies commonly called fixed base operators and on-demand air charter companies. Since NATA Members repair, sell, own, and operate aircraft, they are in the unique position of being concerned with both the manufacturers' and consumers' interest on the subject of product liability.

We applaud your continued efforts to explore the problem with this hearing on the General Aviation Accident Liability Standards Act and lend our full support to product liability reform. Member companies of our organization unanimously believe that a national set of standards is needed to address the rapidly increasing liability costs. Since the federal government regulates the initial design, certification, operation and maintenance of general aviation aircraft, we believe federal standards should be established for general aviation liability litigation as well.

While the spiraling cost of product liability insurance has had an extremely debilitating impact on almost every aspect of General Aviation, NATA is particularly concerned with effect these costs have had in limiting new entrants into flight training and thus eventually contributing to the present pilot shortage the United States is now facing.

At your subcommittee's hearing regarding S. 640 on May 24, witnesses either directly addressed or alluded to the drastic reduction in the number of aircraft sold in the U.S. in last ten years. In 1988, there were only some 1,143 new aircraft sold, a decrease of some 17,000 units from 1979. Concurrently with the number of training aircraft in the U.S. continuing to age without the adequate replacements being produced for needed teaching purposes, it is obvious that the number of new student pilots will continue to decline.

In the past, a number of your colleagues have spoken eloquently of the need to increase the size of the nation's pilot pool as an essential step in maintaining the United States' commercial airline system and guaranteeing the stability of our national defense. Additionally the General Aviation community has understood the necessity of encouraging more people to consider aviation as a career and through the General Aviation Market Expansion Plan's flight training awareness program, it has begun an approach to stimulate interest through a nation-wide advertising campaign. But without the necessary planes for training these potential pilots, all of our words and efforts will have proven to have been a pointless exercise.

NATA appreciates this opportunity to comment for the record and urges the subcommitte to approve S. 640 as quickly as possible. If you need any additional information about the FBO/air charter industry, please do not hesitate to contact us.

Sincerely,

William H. Power

William H. Power
Vice President
Government Affairs

STATEMENT OF JOHN S. YODICE, GENERAL COUNSEL
AIRCRAFT OWNERS AND PILOTS ASSOCIATION

Mr. Chairman:

My name is John Yodice, and I am General Counsel to the Aircraft Owners and Pilots Association. We appreciate the opportunity to submit testimony in support of S. 640, the General Aviation Accident Liability Standards Act of 1989.

The Aircraft Owners and Pilots Association is a nationwide not-for-profit membership association of some 285,000 individual aircraft owners and pilots. We estimate that our members own approximately two-thirds of the active general aviation aircraft in the United States, and do seventy percent of the flying.

AOPA is essentially a consumer organization. Our members have interests on both sides of the product liability debate.

On the one hand, we are the probable victims of any air crashes which are due to defective general aviation products. As such, we have an interest in ensuring that there be a fair compensation system for our members who may be injured or damaged.

On the other hand, we have an interest in the availability, at reasonable cost, of general aviation products. It is apparent to us that many manufacturers and suppliers have curtailed production and others have gotten out of the general aviation business altogether, principally due to product liability concerns.

In 1988, there were only some 1,143 new aircraft sold in the United States. This is a drop from some 17,000 sold in 1979. At the same time, according to the manufacturers, product liability costs rose from $24 million in 1977 to $209 million in

1985. This year they expect the number of new aircraft sold to continue to decline, and the product liability costs to continue to increase.

We have heard much discussion about whether there really is a problem, and if so, who is to blame. There has been a good deal of finger-pointing: "avaricious plaintiffs' attorneys," "profit-hungry insurance companies," "uncaring manufacturers of lousy products," and the like. To the consumer, this finger-pointing exercise is irrelevant. If the manufacturers perceive a problem and withdraw from the manufacture of aviation products, if new entrants are deterred from the market place because of a perceived problem, if insurance companies are unwilling to write coverages or must charge premiums too expensive for the manufacturers because of a perceived problem, then it is not important whether the problem is real. The perception is real. And the unavailability of aviation products is real.

With respect to costs, we have been made aware that our system for compensating victims is inefficient, giving the victim or his survivors very little of the money paid into the system. Most of the money is absorbed by the system in the costs of prosecution and defense. Since the consumers ultimately pay the cost of the system, to the extent that we can help make the system more efficient, we should benefit from lower prices.

It is this interest in cost and availability which distinguishes us from the other so-called "consumer groups," which include the broad based public interest groups and the organized plaintiffs' bar. We believe ours is the more balanced consumer perspective. These groups are interested in the broad subject of product liability and tort reform, but they evidence little, if any, concern about general aviation or its problems. Specifically, and importantly, they are never heard to complain of cost or availability of aviation products. We share their concern for the rights of victims. We regret their narrow focus on this concern to the complete derogation of the other concerns of general aviation consumers.

AOPA is not alone in its views. There are other aviation associations which, to varying extents, may properly be considered to represent the interests of consumers. There is the Experimental Aircraft Association, the National Aeronautic Association, the National Business Aircraft Association, the National Agricultural Aviation Association, the National Air Transportation Association, the Helicopter Association International. Each of these organizations, I believe, shares the views I am expressing to you. They, along with the General Aviation Manufacturers Association, have combined to form a Coalition for General Aviation Liability Reform to support the federal legislation such as S. 640. They, too, distinguish themselves from the other consumer groups which have little concern for the health of the general aviation community, or the cost and availability of general aviation products.

In defining the interests of our members, we, of course, have relied heavily on the views of our members. The only dissenting views have been from some of our members who are plaintiffs' attorneys. But, in building on the views expressed by our members, we have acted as a catalyst in providing a forum for the expression of the views of all interested aviation segments. In April of 1986, AOPA conducted a product liability symposium which solicited these views. In May of 1987, AOPA conducted a parts availability seminar, which, though not specifically directed, quickly focused on product liability concerns as a root cause of the burgeoning parts problem.

The general consensus of these sessions seemed to be that it is appropriate to consider federal legislation confined only to general aviation. Federal legislation is appropriate because aviation is an activity which is already intensely regulated at the federal level with very little regulation at the local level. General aviation, at the federal level, is probably the most intensely regulated of any private activity in this country.

Every aircraft is certificated, maintained and operated to federal standards. Every pilot is trained, certificated and operates to federal standards. The federal government regulates the navigable airspace and operates the air traffic control system. The federal government investigates aircraft accidents, determines their causes, and makes safety recommendations based on these investigations. It's a short step to have federal law control liability arising out of general aviation accidents.

And, the consensus to confine the legislation to general aviation seemed to be because the prospects are better for such legislation than for more generalized tort reform.

In approaching reform, we as a consumer organization start with three premises. First, reform is happening and we need to be involved in it to be sure it does not become unreasonable, and that when all is said and done, our members will have a just and fair compensation system. Second, that we the consumers pay the product liability costs in the prices of the aviation products that we buy. And, third that the present system is inefficient, giving only a small portion of the amounts spent on product liability to the victims, leaving quite a bit of room for improvement.

So, we have become involved. We have attempted to work with the general aviation manufacutuers and others who are attempting this reform. It has been a good faith give-and-take effort. We are especially proud that this legislation does not seek to impose some of the more draconian reforms which have been considered, such as limitations on non-economic damages and punitive damages, restrictions on attorneys' fees and the contingent fee system, and the like. However, we would like to see the time limitation on liability to be 20 years, rather than 12 years as in the House version of the bill (H.R. 1307).

Again, Mr. Chairman, we would like to thank the Subcommittee for the opportunity to include in the record our support for S. 640.

STATEMENT OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, U.S. PUBLIC INTEREST RESEARCH GROUP, AND PUBLIC CITIZEN

INTRODUCTION

Consumers Union[1], Consumer Federation of America[2], United States Public Interest Research Group[3] and Public Citizen[4] respectfully oppose the "General Aviation Accident Liability Standards Act," S. 640. This legislation would have an adverse impact on the existing safety incentives of the tort system and would impair the ability of general aviation air disaster victims, including innocent passengers, to obtain compensation for their injuries. Similarly if S. 640 were enacted, passengers injured in a defective, unreasonably dangerous light plane would encounter multitudinous legal obstacles which may deprive them of justifiable recoveries.

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[1] Consumers Union is a non-profit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union's income is derived soley from the sale of Consumer Reports, its other publications and films. Consumer Reports, with a circulation of approximately 3 million, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions.

[2] Consumer Federation of America is a coalition of over 200 national, state and local consumer, senior citizen, labor, farm, cooperative and rural organizations which together represent more than 30 million people.

[3] United States Public Interest Research Group (U.S. PIRG) is the Washington, D.C. office for state PIRGs across the country. PIRGs are nonprofit, nonpartisan, research and advocacy organizations.

[4] Public Citizen is a nonprofit research and advocacy organization founded by Ralph Nader in 1971 that works on behalf of its over 60 thousand members and all consumers. Congress Watch is the legislative advocacy arm of Public Citizen.

"Reforms" of the tort system like S. 640 would significantly reduce an injured passenger's potential for redress in the courts without providing any other, equally effective method for obtaining compensation. The omission of methods for alternative dispute resolution in this bill is perplexing, considering the fact that the need for an alternative approach to time consuming, costly litigation is well recognized. Yet this legislation drastically cuts back current legal rights of those individuals injured in a general aviation accident, without adding anything back to the product liability system to fill the void.

DEFINITION OF "GENERAL AVIATION AIRCRAFT"

As drafted, S. 640 would apply to any aircraft which is not engaged in regularly scheduled passenger flights, has been certificated by the Federal Aviation Administration (FAA) and which seats less than 20 people. This definition would take in helicopters used for emergency transportation and evacuation as well as recreational aircraft such as hot air balloons and gliders. It does not seem that such a result could have been intended by the drafters and we would ask that such problems be explored and corrected before any action is taken on the legislation.

REGULATION BY THE FAA

The General Aviation manufacturers argue that they deserve special treatment because their industry receives extensive regulatory scrutiny by the Federal Aviation Administration. While it is correct to assert, as proponents of the bill do, that the FAA establishes standards for aircraft design, materials, workmanship, construction and performance, the Federal Aviation Act of 1958, 49 U.S.C. 1421 (a)(1)(Supp. 1985) specifically requires the agency to set only minimum safety standards. Compliance with these standards indicates no more than the manufacturer performed the minimum effort required to make a product safe. See RESTATEMENT (Second) of Torts §288C (1969). See also, Wilson v. Piper Aircraft Corp, 282 Or. 61, 577 P.2d 1322 (1978); Rucker v. Norfolk & Western Railway, 77 Ill. 2d 434, 396 N.E. 2d 534 (1979). Government standards may be outdated or under-protective, and may not reflect the state of knowledge of the industry concerning all safety consequences of industry practices.

More important, FAA regulation often amounts to nothing more than self-regulation by the industry. In certifying the design, manufacture and airworthiness of a craft, "by regulation, the FAA has made the applicant itself responsible for conducting all inspections and tests necessary to determine that the aircraft comports with FAA airworthiness requirements." [U.S. v. S. A. Empresa De Viacao Aerea Rio Grandense Varig, 467 U.S. 797,104 S.

Ct. 2761, 2756 (1984); see also 14 CFR §§ 21.33, 21.35 (1983)]. As the Supreme Court explained in Varig, the intimate involvement of aircraft manufacturers' employees themselves in the certification process is compounded by the FAA's own practices:

> With fewer than 400 engineers, the FAA obviously cannot complete this elaborate compliance review process alone. Accordingly, 49 U.S.C. § 1355 authorizes the Secretary to delegate certain inspection and certification responsibilities to properly qualified private persons. By regulation, the Secretary has provided for the appointment of private individuals to serve as designated engineering representatives to assist in the FAA certification process. 14 CFR § 183.29 (1984). These representatives are typically employees of aircraft manufacturers who possess detailed knowledge of an aircraft's design based upon their day-to-day involvement in its development. See generally Improving Aircraft Safety pp. 29-30. The representatives act as surrogates of the FAA in examining, inspecting, and testing aircraft for purposes of certification. 14 CFR § 183.1 (1984). In determining whether an aircraft complies with FAA regulations, they are guided by the same requirements, instructions, and procedures as FAA employees. FAA Order 8110.4 p. 151; CAA Manual of Procedure § .70(b). FAA employees may briefly review the reports and other data submitted by representatives before certificating a subject aircraft. Improving Aircraft Safety 31-32; FAA Order 8110.4, p. 159; CAA Manual of Procedure § .77.

In view of this, it is not surprising that the Supreme Court of California concluded in Elsworth v. Beech Aircraft Corp., 208 Cal. Rptr. 874 (1984):

> Here, there can be no question as to the intent of Congress to allow the states to apply their own laws in tort actions against aircraft manufacturers for the defective design of airplanes, in spite of the fact that federal law may have completely occupied the field of regulation of aircraft safety and certification. The Federal Aviation Act of 1958 expressly declares that its provisions are not intended to abridge remedies that a party may have under state law. (49 U.S.C. § 1506).

We are not aware of any alteration of the Federal Aviation Act or of any changes in FAA practices that would justify the abridgement of state tort law remedies embodied in S. 640.

Finally, it is ironic that the same community of airplane makers and users, known for opposing regulation by the FAA, is now seeking to hide behind such regulation as a means of avoiding liability.

PREEMPTION

Proponents of this measure argue that preemption of state laws regarding liability is appropriate since every other aspect of the aviation industry is regulated by the federal government. We must disagree.

Tort law, as developed through the states, encourages manufacturers to make safe products. Tort litigation serves a complementary function to regulation. Proponents of this bill seek to displace particularly effective, safety enhancing tort rules with a federal scheme which will tilt the balance in favor of manufacturers, sellers and pilots. According to proponents, the changes contained in S. 640 are justified due to the federal regulatory role in their industry. We do not agree, and must reiterate the fact that the Federal Aviation Administration is required only to set minimum safety standards.

THE ISSUE OF SUPPLY AND DEMAND AND STATUTE OF REPOSE

The source of the economic decline of the general aviation industry can be traced to the surplus of high quality, used airplanes on the market. S. 640 does not address the problems for the industry caused by oversupply and reduced demand. The March, 1986 issue of Industry Week noted that:

> "A great many good used aircraft remain available, especially at the low end which reflects a basic industry problem: it makes its planes too well...."
>
> "Until recently, major technological advances have been rare."

To resolve the problem caused by the oversupply of good, high quality used aircraft which compete favorably with the new models, the general aviation industry is seeking an arbitrary cut-off of the right to pursue claims for damages. Under Section 7 of S. 640, passengers injured in a general aviation accident would not have the right to pursue a claim, if the accident involved a small craft or its parts which were more than 20 years of age.

The practical consequence of the 20 year statute of repose would be to automatically cut off remedies to general aviation accident victims, irrespective of the useful life of the product (the useful life of a general aviation aircraft extends beyond 20 years as a general matter) or the defectiveness or degree of danger associated with the product. It is unfair to bar just, provable claims simply because of the age of the product, especially where as here, the industry produces planes that are intended to last beyond 20 years. Furthermore, consumers purchase used small planes with the expectation that they will be safe for use for many years.

Just one example of how such a statute of repose might operate unfairly is the case of the July 19, 1989 crash of a Beechcraft 18S shortly after takeoff from Baltimore-Washington Airport. The plane caught on fire five minutes after takeoff and slammed into a house in Ferndale, Maryland killing a seven month old child whc was in the house and the pilot. The plane involved was 34 years old. The FAA has records of several other similar accidents involving fires on other Beechcraft 18S aircraft. This could prove to be evidence of a defect. If an unreasonably dangerous defect is found to exist, it would be unfair to bar recovery simply because the plane was more than 20 years old.

In short, while we believe product liability litigation involving older products poses extreme evidentiary difficulties for plaintiffs and are typically harder to pursue and prove than cases involving newer products, we oppose efforts to bar lawsuits based on some arbitrary age of the product. Thus we cannot recommend the age of the product as a basis for barring suit. However, we would not oppose a measure which would establish a rebuttable presumption that a product older than its recognized useful life was not defective or unreasonably dangerous. At least such a provision would allow innocent victims whose injuries or death occur as a result of an unreasonably dangerous and defective small plane, the opportunity--though limited by the presumption--to recover compensation.

STANDARDS OF LIABILITY

Section 5, which sets forth the standards of manufacturer liability, dramatically tips the scales of justice against the victims of aviation accidents that result from dangerous defects in the aircraft involved. Section 5 would upset the proper balance between parties to a lawsuit by eviscerating the doctrine of strict liability and creating significant barriers to recovery.

Product liability cases are inevitably complex ones where the manufacturer's expertise and necessarily greater knowledge of the facts relevant to the issue of a product's design and manufacture create crucial advantages for defendants in the cases. Under S. 640, accident victims would be forced to prove not only that a product was dangerously defective (as under the doctrine of strict liability) but other elements of liability, evidence for which in many cases can be impossibly elusive.

1. Section 5(b)(1)(A) Would Increase Plaintiff's Burden

Section 5 would impose on plaintiffs a significant added burden when they brought strict liability claims. Instead of merely having to come forward and show that the product that injured them was dangerously defective, they would also have to prove, in effect, that the condition of the product was unreasonably dangerous according to "engineering and manufacturing practices... which were reasonably feasible." Most courts already permit the feasibility of design alternatives to be considered as part of the determination of a product's defectiveness. See, e.g., Barker v. Lull, Engineering Co., Inc., 573 P.2d 443 (Ca. 1978); Bruce v. Martin-Marietta Corp. & Ozark Airlines, Inc., 544 F.2d 442 (10th Cir. 1976) (applying Maryland and Missouri law). However, as the court in Barker made clear the burden of proving that the product was not defective in light of what was feasible must rest with the manufacturer. After all, it is the manufacturer who is uniquely positioned to understand the characteristics of a product's design as well as those of any alternatives. It is simply unfair to require the far less qualified of the two parties, the plaintiff, to shoulder the burden of proof in this inquiry.

2. Section 5(b)(1)(A) Narrows Manufacturer Liability

At the same time as it increases plaintiff's burden, Section 5(b)(1)(A) would narrow the scope of a manufacturer's liability for an unsafe product. Before a plaintiff could even get his or her case to the jury, he or she would have to show not just that the defect was unreasonably dangerous in light of what could or should have been possible but that the product was defective "according to engineering and manufacturing practices... which were reasonably feasible." The use of the phrase "engineering and manufacturing practices" comes uncomfortably close to suggesting that the measure of defectiveness would be the customs and practices of the industry. Even in a negligence context, the law has long since rejected the notion that a manufacturer's obligations are limited by industry custom or practice. See The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932) (L. Hand, J.).

Any inclusion of a "state of the art" concept in a strict liability standard, which Section 5 would do, must encompass incentives to produce safer aircraft. Accordingly, there must be an affirmative duty to advance the state of the art. Defectiveness or unreasonable danger must be determined with regard not just to what was known but to what could have been known though appropriate testing and inspecting, and through investigation of potential product risks. At the same time, product design must be adjudged with regard not just to what was reasonably feasible but to what could have been rendered feasible. A narrower formula such as the one included in Section 5 would seriously undercut manufacturers' incentives for safety. Holding a product to no greater standard than reasonable feasibility would mean that the law would not require the manufacturer to push the limits of "existing technology" of safety beyond current limits--just the opposite of what the doctrine of strict liability must continue to do.

Manufacturers often argue that "state of the art" defenses allow manufacturers the freedom to improve their products without fearing that improvements will later be used against them to prove the availability of an alternative, safer design. On the contrary, S. 640's state of the art language would encourage manufacturers to ignore the safety consequences of their activities. The standard of liability would impose negligence-based limitations upon an injured person's recovery even where he has proven that the product is unreasonably dangerous and defective. Accordingly, the product would not be considered unreasonably dangerous and defective unless engineering and manufacturing practices which were reasonably feasible could have prevented the harm.

Under the liability standard of S. 640, manufacturers would not be encouraged to advance the state of the art, since by seeking safer substitutes for dangerous products, liability could attach. State of the art language will serve only to stifle safety innovations.

3. Section 5 Would Relieve Manufacturers of the Duty of Producing "Crashworthy" Aircraft or Aircraft Capable of Withstanding Other Foreseeable Risks

Section 5(b)(1)(A) would adjudge the safety design of a small plane only in the context of its "intended use" or "intended purpose." Current law, however, requires more of a product: it must be adequate to meet all foreseeable circumstances even if they involve uses or misuses that were never intended. This doctrine of foreseeability is indispensable to ensuring the safety incentives created by strict liability. *See*, *e.g*., *Larue* v. *National Union Electric*, 571 F.2d 51 (1st Cir. 1978).

Under current law, it would be impossible in virtually any state court for aircraft owners to argue that either unusual exigencies or pilot boldness, for example, are not foreseeable in the use of their aircraft. Nor could they argue that such foreseeable factors would not lead to foreseeable deviations in the use of the aircraft from "the purpose and ... manner for which it was designed and manufactured." From the point of view of safety, particularly the safety of innocent passengers who have no control over such exigencies or deviations, it is critical that manufacturers be obliged to continue to make products that can accommodate the risks that result from such deviations. Unfortunately, Section 5 would relieve manufacturers of this obligation.

This doctrine is particularly vital in the area of general aviation because "foreseeability" helps to ensure that aircraft are designed to be "crashworthy". If the design of a craft were considered only in the context of their intended use (i.e., used to fly, not to crash) then aircraft would not have to be designed, as they are now, to protect occupants from injuries in crashes. Meil v. Piper Aircraft Corporation, 658 F.2d 787 (10th Cir. 1981); Duncan v. Cessna Aircraft Co., 632 W.W.2d 375 (Tex. App. 1982). See Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). Indeed, courts fashioned the concept of "crashworthiness" as a design element required for the foreseeable risks created by aircraft and automobiles precisely in response to manufacturers' arguments that air and auto crashes were not among the intended uses of planes and cars. In Duncan, for example, an easily correctable design flaw in the occupant seats led to death in a low-speed plane crash. The manufacturer sought to escape liability in part on the ground that the accident was not an intended use of the craft. Defining foreseeability very broadly, the court ruled that the manufacturer had to be held liable for foreseeable, if unintended, mishaps.

JOINT AND SEVERAL LIABILITY

S. 640 would arbitrarily restrict recovery in general aviation accidents by substantially limiting the liability of defendants who share responsibility for the accidents. Rather than allow injured parties to recover all their damages from a defendant who is substantially responsible for the injuries, as under the widely accepted state law rule of joint and several liability, S. 640 would limit defendants' financial exposure to the exact percentage of damages that plaintiffs can prove each defendant responsible for.

Section 6's rule of comparative responsibility would hold the innocent victims of general aviation accidents--instead of the manufacturers, suppliers, maintenance personnel or pilots who caused the accident--financially responsible for the portion of damages attributed to "nonparties" (e.g., insolvent manufacturers, under- or uninsured suppliers and employers immune from lawsuits under workers' compensation laws). This rule of law would leave general aviation accident victims undercompensated by limiting the liability of defendants whose conduct, by itself, was sufficient to cause the entire accident or was an essential factor in causing the accident.

Furthermore, the comparative responsibility provisions may be inconsistent with some of the concerns addressed in Rule 19 of the Federal Rules of Civil Procedure, Joinder of Persons Needed for Just Adjudication. The rule requires that indispensable parties be joined to the action where feasible, and where not feasible that the action be dismissed unless strong policy considerations dictate otherwise. The rule is aimed at protecting the interests of nonparties and securing full recovery for plaintiffs.

S. 640's requirement that the trier of fact make findings as to the comparative responsibility of persons not a party to the action comes uncomfortably close to suggesting that courts have the power to adjudicate an absent party's share of responsibility. We are concerned that the comparative responsibility provisions of S.640 could be interpreted to interfere with the rules of joinder. Maintaining the integrity of the joinder rules is important because they prevent nonparties from being unfairly affected by an adjudication and help ensure that parties will not be subjected to double or inconsistent liability.

We believe that victims' interests in full, fair recovery are best served by preservation of the common law doctrine of joint and several liability. Under state law, joint and several liability applies only when there is an indivisible harm resulting from the conduct of more than one party. A victim suffers indivisible harm when multiple parties--like airplane parts manufacturers, assembly personnel and pilots--engage in injurious conduct, yet the conduct of any one of the parties in itself could cause the entire injury, or the conduct of each party could be an essential cause of the injury. Because responsibility for the kinds of injuries resulting from aviation accidents cannot be logically divided among the defendants, it is unfair to condition plaintiffs' recovery on proving the precise responsibility[5] of each defendant.

LIABILITY INSURANCE COSTS

In recent years, the safety record of general aviation has improved, yet manufacturers' liability insurance costs have increased. Some might argue that such increases are the result of product liability claims. This is simply not the case.

General aviation is not the only endeavor plagued by substantial insurance rate increases over the last few years. Professions and activities, such as day-care centers, nurse midwives, school bus companies, commercial fishermen, architects, accountants, municipalities and physicians all have experienced huge premium increases. These groups have experienced staggering rate increases, despite their safety records or litigation history. Moreover, many of these groups are self-insured, like the general aviation industry, and are subject to standards of liability similar to those contained in S. 640.

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[5] S. 640 only retains joint and several liability for manufacturers under limited circumstances related to defective systems, components, subassemblies, etc. over which such manufacturers have substantial control.

In December of 1987, the National Association of Insurance Commissioners testified before the Commerce, Consumer Protection and Competitiveness Subcommittee that it had concluded that tort legislation would not reduce insurance rates: "We have not bought the underlying argument that the liability crisis was principally caused by excesses in the tort system."

Furthermore, the general aviation manufacturers have not offered any concrete evidence demonstrating that enacting this legislation would have any impact on insurance rates. The suggestion that limiting victims' rights will automatically lower or contain premiums has no basis in fact. In January of this year, Roger Gilbert, chairman of the insurance industry's ratemaking organization warned in a speech before an industry group that tort reform " will not eliminate the market dynamics that lead to insurance cycles." According to Mr. Gilbert, "We must not over-promise--or even imply--that insurance cycles will end when civil justice reform begins."

INNOCENT BYSTANDERS PROVISION

Exclusion of innocent bystanders from coverage under this bill is unquestionably an improvement from previous proposals which included innocent bystanders. The bill as reported from the Senate Committee on Commerce in the last Congress also excluded bystanders in order to respond to the Aero Mexico disaster, where innocent people on the ground and passengers aboard a commercial plane were involved in a general aviation accident. We would again offer the example of the recent Beechcraft crash near BWI in which a seven month old child was killed on the ground, in support of the exclusion of innocent bystanders. Since the Senate Commerce Committee recognized that innocent victims\bystanders and innocent victim\commercial passengers should be excluded from the bill, we see no compelling rationale for failing to extend the exclusion to all innocent passengers.

CONCLUSION

The General Aviation Accident Liability Standards Act would create reduced liability rules for manufacturers of general aviation aircraft. The proponents of the legislation have not demonstrated that the existing state standards have been applied in an unreasonable manner. In contrast, it is clear that the legislation would leave injured passengers without adequate compensation. Equally important, relaxing liability standards could only result in decreased incentives to design and manufacture safer aircraft.

News from

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POINT-BY-POINT REBUTTAL TO ATLA BROCHURE

In March 1989, the Association of Trial Lawyers of America (ATLA) distributed a four-page brochure to members of Congress. The cover contains a sensational, bold mandate -- "WARNING: The General Aviation Liability Bill is UNFAIR to consumers and victims." The text constitutes a flagrant and disgraceful distortion of the truth supported by examples and statements taken out of context. In view of the many inaccuracies in the ATLA text, the following rebuttal is in order.

ATLA *"Industry claims to be suffering from an insurance crisis and has sought relief ... to limit its liability for the manufacture of defective aircraft."*

Reply **The general aviation industry has never claimed an insurance crisis and has never attempted to limit its liability for defective aircraft. In fact, manufacturers have publicly expressed their commitment to satisfy any liability for defective products, and there are no caps in this bill. The industry does, however, seek relief from damages that a court of law determines are the fault of others.**

ATLA *"Changing our legal system won't solve the insurance problem because the legal system didn't cause the insurance problem."*

Reply **Runaway court judgments have driven premiums out of reach and forced several general aviation manufacturers to self-insure -- at least up to catastrophic levels. Product liability costs -- judgments, settlements and defense costs -- are now borne directly by the manufacturers and must be recovered through new aircraft sales. The legal system remains the cause; the insurance premium escalation an effect.**

ATLA "Even in those states where 'tort reform' has been enacted, premiums continue to rise."

Reply **Individual state reforms would have little effect on aviation insurance premiums since changes in premiums reflect national trends, not local actions.**

> *ATLA* *The brochure brands as FICTION the implied industry claims that the "production and sales of general aviation aircraft have declined drastically in the past ten years because of increased liability costs and exorbitant damage awards." They assert that "the decline in sales is unrelated to the legal system. The reasons are many and varied, but the decline is not the result of lawsuits or insurance."*

Reply **Increased liability costs and exorbitant damage awards are the most significant among several causes of reduced sales. ATLA states the decline is not the result of lawsuits or insurance. However, the increase in industry product liability costs -- judgments, settlements and defense -- from $24 million to $210 million over the past decade has occurred despite an improving safety record. The tort system is unquestionably at fault.**

> *ATLA* *A Cessna spokesman listed several factors contributing to the decline in aviation sales in an eleven-page paper, and product liability costs were mentioned in only one sentence.*

Reply **The fact that the Cessna spokesman mentioned product liability in only one sentence in an eleven-page paper means nothing; it is an engineering document.**

> *ATLA* *Flight International magazine explained the drop in sales "because there are as many aeroplanes around as people want."*

Reply **Flight International has also written on numerous occasions about product liability's impact on airplane costs and the resultant drop in sales. Numerous publications have written about this industry's tort problems. In addressing the subject, The Economist offered, "Welcome to an industry killed by lawyers." (Attachment 1)**

> *ATLA* *A GAMA spokesman said "... that we probably built too many aircraft in the late '70's..."*

Reply GAMA has never said that product liability was the sole cause of declining sales, but the many planes built in the 1970's are causing part of the product liability problem today.

ATLA *The brochure identifies as FICTION statements that "this bill does not limit the rights of injured passengers or their families" and that "it is a modest and reasonable way to establish uniform liability." Moreover, they claim "the bill does limit the rights of passengers and pilots" barring "claims for compensation if the aircraft is over a certain number of years old ... If the manufacturer cannot stand behind its aircraft after 12 or 20 years, why is it safe enough for the American public to fly?"*

Reply The bill does not limit the rights of injured parties to seek redress; it does convey to the courts, however, the responsibility to determine the amount and extent of liability. Moreover, the bill recognizes that aircraft manufacturers should not be indefinitely held responsible for products that are operated, repaired, serviced and modified by other parties beyond the manufacturer's control. Manufacturers do stand behind their aircraft and send post-sales information regarding the safe use and care of the products to the owners -- for the life of the airplane. But there is no guarantee of consumer compliance, and no product will serve its owner forever without proper care.

ATLA *"By statute, FAA standards are minimum standards, allowing a significant degree of self-regulation by the industry. Congress should not further shield the industry ... but should instead focus on improving safety."*

Reply The trial lawyers repeatedly misquote FAA standards as being "minimum standards." In the law establishing the FAA and in all of the FAA regulations, the words "minimum standards" are always used with the qualifying words, "in the interest of safety" or "necessary for safety" -- a big difference. The FAA says that "such minimum standards provide an acceptable level of safety. The term 'minimum' apparently has been equated with the term 'minimal,' but that is not how the FAA views its mandate to prescribe standards." Finally, there is no industry self-regulation. None! While manufacturers may perform some tests autonomously, they must meet FAA regulations. FAA participates in some of this work, spot checks some, and reviews all certification data. The FAA retains final authority over airworthiness determinations. The term "self-regulation" is misused since the FAA is the final certification authority.

ATLA *Statements that "trial lawyers are the only group opposing this bill" and that "it is supported by actual 'consumers' of the product involved, the aircraft owners themselves," are labeled FICTION. The following statements are offered as FACT: "The Consumer Federation of America ... Consumers Union .. Public Citizens ... U.S. Pirg opposes this bill. These groups have stated that it would make it exceedingly more difficult, if not impossible for innocent passengers and their families to receive adequate compensation for the horrendous injuries and deaths associated with general aviation air crashes."*

Reply Proponents of the bill have NOT alleged that trial lawyers are the only group opposing this bill. A number of the national consumer groups listed have testified before Congress in opposition to the bill; their position is no secret. They really have little, if any, stake in the issue, however; the bill would not cover aircraft engaged in scheduled passenger-carrying operations. Those who truly have a consumer stake in this legislation -- the actual owners and operators of general aviation aircraft -- are well-represented nationally and they enthusiastically support this bill. Allegations that the bill would make it more difficult, if not impossible, for injured parties to receive adequate compensation is simply a cry to keep the "deep pocket" of the manufacturer available forever in case the responsible parties cannot afford some of the outlandish court awards.

ATLA *"Even purported backers of the legislation candidly admit the measure is flawed and would not solve the manufacturers' insurance problem." They quote AOPA President John Baker as writing in support of their position.*

Reply The use of Mr. Baker's quotations to support ATLA's opposition to general aviation product liability legislation is ironic indeed. As recently as March 16, 1989, AOPA issued a news release (Attachment 2) which referred to such legislation as "strongly endorsed by the 285,000-member Aircraft Owner and Pilots Association." Mr. Baker is quoted as saying, "Product liability costs have clearly helped stifle technological innovation in aircraft" and that "prices also have skyrocketed due in large part to liability concerns." Moreover, Mr. Baker's earlier quotation about product liability judgments not being the cause of the new aircraft shortage contradicts the Chairman of the Cessna Aircraft Company who suspended production of piston-powered aircraft in 1986 and has stated they cannot resume production until the product liability issue is resolved.

ATLA *"Why should the American consumer -- especially the innocent victims of defective aircraft -- pay the price for the poor judgement of a billion dollar industry?" ATLA says the industry claims it "needs this bill to survive and that thousands of jobs are at stake." They also add that industry deliveries increased by 40 percent in dollar volume in 1988 without special liability relief, and that they should build safer aircraft to avoid product liability lawsuits.*

Reply Innocent victims should not pay the price for defective aircraft; manufacturers should. However, manufacturers should not pay for defective maintenance, defective servicing or defective operation. The courts have the responsibility to assess damages, and the responsible parties should pay their determined share; a manufacturer should not have to pay a large share when only minimally responsible. The domestic general aviation industry is at risk -- both from the courts and foreign competitors -- and thousands of jobs have indeed been lost.

1988 unit delivery figures did show marginal improvement for the first time in a decade. What is not mentioned, however, is that the 1143 airplanes delivered in 1988 comprise only 6.5 percent of the 17,811 units delivered ten years earlier. Piston-powered planes, long the mainstay of training and personal flying, continue to be severely depressed in large part because of product liability costs. The dollar increase reflects the continuing demand for higher priced turbine-powered business aircraft. ATLA's suggestion to build safer aircraft decries NTSB statistics that reflect continuing improvement in general aviation safety despite an aging fleet, and the Board's findings that 84% of all accidents involve human error.

ATLA *The brochure cites "Examples of aircraft made safer as a result of lawsuits which may never have been brought if this bill had been law."*

Reply The problems with the Beech Bonanza V-tail stemmed from some aerodynamic characteristics that were unknown when the airplane was designed in the 1940's. Only after an extended Beech/FAA program were the original deficiencies identified and corrected. The aircraft was "made safer" as a result of this program, not the 1985 lawsuit.

The Cessna 411 is in fact able to fly on one engine, but it requires a trained, competent pilot. It does meet the FAA certification requirements and should not remain a liability of the manufacturer to cover operator incompetence. The plane crash ATLA notes resulted from evasive action the pilot had to take to avoid a mid-air collision --

not single-engine performance -- and he survived.

The allegation of defective seats in Cessna airplanes cites a jury-awarded punitive damages case as resulting in the seats being fixed. ATLA is wrong; the seats were not "fixed" because they were not defective. Cessna and the FAA agreed on proposed changes to inspection and adjustment instructions, but they were never directed. Why? The pilot community protested that any seat problems, particularly those cited in the punitive damage award, were the result of poor pilot judgement, not the manufacturer's design or instructions.

ATLA *"This is hardly the time to be removing a major incentive for building safe planes." ATLA reiterates its erroneous contention that product liability is simply not the cause of the industry's "insurance woes," and this bill will make it far more difficult for injured parties to be fairly compensated.*

Reply The industry remains dedicated to building the safest airplanes possible, with or without this bill. This bill would, however, provide additional incentives to other potentially liable parties to provide better service, maintenance and operational competence because of their comparative liability. And the additional insurance coverage they will seek should make it even easier for injured parties to be fairly compensated. This bill would have a positive effect on general aviation safety and the entire user community. In fact, it would restore some long-needed fairness and responsibility to the general aviation tort system. That is why this legislation is supported by general aviation consumers, service organizations and manufacturers alike.